Supreme Court, U.S.
FILED
10-189 AUG 6 - 2010
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BOHDAN R. PANKIW
Chief Counsel

Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-5000

JOSEPH K. WITMER
Counsel of Record

KATHRYN G. SOPHY
Deputy Chief Counsel

Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-3663
joswitmer@state.pa.us

CURRY & TAYLOR ♦ 202-393-4141

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit violated this Court's precedent by upholding the FCC's errant usurpation of the states' right to set rates for local intrastate communications by replacing those state rates with a mandatory interstate rate contrary to this Court's ruling that federal law requires states to set the rates for local intrastate telecommunications using a cost-based FCC pricing model.

PARTIES TO THE PROCEEDING

Pennsylvania Public Utility Commission, Petitioner

Federal Communications Commission; United States of America, AT&T, Inc., Carolina Telephone and Telegraph Company LLC, Central Telephone Company, Central Telephone Company of Texas, Central Telephone Company of Virginia, Embarq Communications, Inc, Embarq Florida, Inc; Embarq Minnesota, Inc; Embarq Missouri, Inc; Level 3 Communications, LLC; MetroPCS Communications, Inc.; Qwest Communications International Inc.; Sprint Nextel Corporation; The United Telephone Company of Pennsylvania LLC, doing business as Embarq; United Telephone Company of Eastern Kansas, doing business as Embarq; United Telephone Company of Indiana, Inc, doing business as Embarq; United Telephone Company of Kansas, doing business as Embarq; United Telephone Company of New Jersey, Inc., doing business as Embarq; United Telephone Company of Ohio, doing business as Embarq; United Telephone Company of Southcentral Kansas, doing business as Embarq; United Telephone Company of Texas, Inc, doing business as Embarq; United Telephone Company of the Carolinas LLC, doing business as Embarq; United Telephone Company of the Northwest, doing business as Embarq; United Telephone Company of the West, doing business as Embarq; United Telephone Southeast, LLC, doing business as Embarq; Verizon, Core Communications, Inc., EarthLink, Inc., 01 Communications, Inc., Pac-West Telecomm, Inc., Public Service Commission of the State of New York, National Association of Regulatory Utility Commissioners, National Association of State Utility Consumer Advocates, Respondents

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 35

APPENDIX

Relevant Provisions Involved 1a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 , 119 S.Ct. 721 (1999) ..... *passim*
Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) 13
Competitive Telecommunications Association v. FCC, 87 F.3d 522 (1996) 22, 34
Covington & Lexington Turnpike v. Sandford, 164 U.S. 578 (1896) 21
Duquesne Light Company v. Barasch, 488 U.S. 299 (1989) 21
FCC v. Fox Television Stations, Inc., ___ U.S. ___, 129 S.Ct. 1800 (2009) 20
In re Core Communications, Inc., 531 F.3d 849 (D.C. Cir. 2008) ..... *passim*
Iowa v. FCC, 219 F.3d 744 (8th Cir. 2000) (Iowa) *aff'd in part and rev'd in part, Verizon v. FCC*, 535 U.S. 467 (2002) ..... *passim*
Motor Vehicle Mfrs. Assn. of United States Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) 22
United States v. Nixon, 418 U.S. 683 , 94 S.Ct. 3000, 41 L.Ed2d 1039 (1974) 20
Verizon v. FCC, 535 U.S. 467 (2002) ..... *passim*
WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002) 14

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2
47 U.S.C. §§ 1, et seq. 2
47 U.S.C. §§ 201 and 251(i) 3
47 USC § Section 201 ..... *passim*
47 USC § 251(b)(5) ..... *passim*
47 USC § 251(g) 13, 14
47 USC § 251(i) ..... *passim*

47 USC § 252 ..... 3, 11, 20
47 USC § 252 (d) 6, 9, 15, 17
47 USC § 252(d)(2) 13
47 USC § 252(d)(2)(A)(i) 16
47 USC § 251 and 252 20
47 USC § 251(b)(5) and 252(d) 9
47 USC § 251(b)(5) and 252(d)(2) 13

STATE STATUTES

66 Pa.C.S. § 3009(a), sunset Dec. 31, 2003 25
66 Pa.C.S. § 3019, 3009, eff. Nov. 30, 2004 25

ADMINISTRATIVE DECISIONS

Federal

In Re Implementation Of The Local Competition Provisions In The Telecommunications Act of 1996, CC Docket No. 96-98, *Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation For ISP-Bound Traffic*, CC Docket No. 99-68, (Nov, 5, 2008), 24 FCC Rcd. 6475 (2008) 1, 7
In Re Matter Of Implementation of The Local Competition Provisions In The Telecommunications Act of 1996, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185 FCC 96-325, (August 8, 1996), 11 FCC Rcd 15499 (1996) 2, 10
In Re Matters Of Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities, CC Docket No. 02-33, *Universal Service Obligations Of Broadband Providers, Review Of Regulatory Requirements For Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, (Sept. 23, 2005) 20 FCC Rcd

14853 18
In Re Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) 7
Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999) 12
In Re Time Warner, Inc., Docket No. WC 06-55 (March 1, 2007) 18, 29
In Re Fiber Technologies v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-014 (February 23, 2007) 18
In Re DQE Communications Network Services v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-027 (Feb. 2, 2007) 18

State

In Re City Signal, 1996 Mich. PSC Lexis 31 (1995) 19

Application of MFS, et al., 1995 Pa PUC Lexis 87 (1995) ..... *passim*

OTHER AUTHORIES

Ex Parte Filings

In Re Intercarrier Compensation for ISP-Bound Traffic, Docket No. 96-98, CCB/CPD 97-30, *Bell Atlantic Ex Parte Filing*, Correspondence of Edward Young, III, and Thomas J. Tauke, (July 1, 1998) ..... *passim*
In Re Intercarrier Compensation for ISP-Bound Traffic, Docket No. 96-98, CCB/CPD 97-30, *Ex Parte Letter of ALTS* (July 2, 1998) ..... *passim*
In Re Developing a Unified Compensation Regime, Docket Nos. 01-92, 07-135, *Ex Parte Letter of*

Verizon (July 28, 2010) ..... *passim*

The Pennsylvania Public Utility Commission (PaPUC) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in the Appendix to Core Communication, Inc.'s, Petition, is reported at 592 F.3d 139 (D.C. Cir. 2010) Core Pet. App. 1a-14a, (the *Core Decision*).[1] The *Core Decision* upheld an Order of the Federal Communications Commission (FCC) on *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic; Order on Remand and Report and Order and Further Notice of Proposed Rulemaking* in CC Docket Nos. 96-98 and 99-68, and is reported at 24 FCC Rcd. 6475 (2008) (*Core* Pet. App. 15a-59a). The FCC order is commonly referred to as the "*Order on Mandamus.*"

JURISDICTION

The DC Circuit Court released its *Core Decision* on January 12, 2010, upholding the FCC's *Order on Remand.* The DC Circuit Court denied the PaPUC Petition for Rehearing En Banc or Rehearing on March 26, 2010. Core Pet. App. 1085a and 1087a-1088a. This petition is timely filed by operation of Rule 13, including an extension granted on June 15, 2010. The

---

[1]The PaPUC relies on the Core Appendix for citations in the Petition for Writ of Certiorari for judicial and petitioner economy.

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The appropriate provisions of the Communications Act of 1934 and the Telecommunications Act of 1996, set forth at 47 U.S.C. §§ 1, *et seq.*, are set forth in the Petitioner's Appendix. PaPUC Pet. App. 1a-22a.

STATEMENT

This petition for writ of certiorari seeks this Court's review of a three-member panel decision in *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), 2010 WL 86672, Core Pet. App. 1a-14a, including the Court of Appeal's denial on March 26, 2010, of the Commonwealth of Pennsylvania's Petition for Rehearing or Reargument En Banc. (*Core Decision)*, Core Pet. App. 1085a-1086a and 1087a-1088a

Following enactment of the Telecommunications Act of 1996 (TA-96), the FCC issued rules implementing TA-96 in its First Report and Order. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order*) Docket Nos. 96-98 and 95-185 (August 8, 1996).

The FCC found that it could set proxy rates and that the FCC would develop the cost model for those

rates *i.e.*, Total Element Long Run Incremental Cost (TELRIC). *Id.* at ¶¶ 625, and 672, 690-698.

In 1999, the Supreme Court partially affirmed the FCC by holding that the states were expected to set rates, since the FCC had no authority to set rates under Section 252, using a pricing model developed by the FCC. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384-385, 119 S.Ct. 721 (1999) (*AT&T*).

The Eighth Circuit later vacated the FCC's proposed "proxy" rates the states were to use in setting Section 252 reciprocal compensation rates based on TELRIC. The Eighth Circuit read the *AT&T* precedent as requiring the FCC to establish the pricing model but that the states were responsible for setting the reciprocal compensation rates. *Iowa v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (*Iowa*) *aff'd in part and rev'd in part, Verizon v. FCC*, 535 U.S. 467, 468-473 (2002).

Introduction

The *Core Decision* that is the subject of the PaPUC's Writ of Certiorari is the third in a series of attempts by the FCC to secure judicial imprimatur for the FCC's usurpation of the states' right to set rates for local intrastate telecommunications. The PaPUC seeks this Court's review to correct the erroneous conclusion of law that Sections 201 and 251(i) of federal law, 47 U.S.C. §§ 201 and 251(i), empower the FCC to replace state-set rates for local intrastate telecommunications with a new mandatory interstate rate of $.0007 per Minute of Use for local intrastate telecommunications.

The question is whether it is the FCC or the states that set the intercarrier compensation rate for local intrastate telecommunications, in this case local dial-up telephone calls when a carrier's customer makes a local intrastate telephone call to access the internet over the customer's local telephone line.

The PaPUC submits that the *Core Decision* ignores this Court's precedent holding that states are responsible for setting the rates for local intrastate calls under federal law using a pricing model developed by the FCC and approved by this Court under the Telecommunications Act of 1996. *AT&T*, 525 U.S. at 384-85; *Verizon v. FCC*, 535 U.S. at 468.

The *Core Decision* wrongly affirmed the FCC's conclusion that Section 201 authorizes the FCC to impose a mandatory $.0007 reciprocal compensation rate for local intrastate telecommunications when a customer uses the local telephone line to make a local intrastate call that later provides access the internet.

This Court's precedent directing states to set the rates for intrastate local calls based on an FCC model is controlling and the *Core Decision* and *Order on Remand* are incorrect. The *Core Decision* upholds a mandatory interstate rate of $.0007 per Minute of Use (MOU) for local intrastate telecommunications. *Compare Core Decision*, Core Pet. App. 5a-6a with Core Pet. App. 10a.

Precedent of this Court upheld the FCC's TELRIC model and the ancillary requirement that rates set under TELRIC include "joint and common" network costs. The *Core Decision* below ignores that precedent

and allows the FCC to unilaterally abandon that model and the underlying rates in favor of a rate of $.0007 per MOU that is, by the FCC's own admission, unrelated to actual cost.

The PaPUC submits that state rates based on the TELRIC model are more consistent with this Court's precedent than the fixed interstate rate of $.0007 per MOU. The PaPUC argues that the fixed rate is not related to cost but may better reflect some carriers' changed business interest.

The FCC's mandatory interstate rate is so low and without cost justification as to be unjust and confiscatory. Moreover, the FCC apparently intends to use this usurpation of the states' right to set rate for local intrastate telecommunications well beyond the narrow confines of local intrastate calls to access the internet.

The PaPUC maintains that the fact that carriers terminate an end user's local dial-up call at an Internet Service Provider's (ISP's) premises, where the ISP reformats the call as part of its delivery of an information service not regulated by the states, is critical. The fact that a terminated local call is reformatted to provide information services does not affect how and where the call is originated and terminated. This reformatting does not exempt the local call from this Court's determination that states must set the rates for local intrastate telecommunications using the TELRIC pricing model.

A terminated intrastate call is not transformed into an interstate call under Section 201 of the

Communications Act of 1934. Further, the FCC cannot rely on Section 251(i) to reach intrastate telecommunications and set rates under Section 201 because the power claimed did not exist before 1996.

Summary of Argument

The PaPUC seeks a writ of certiorari for three reasons.

First, the *Core Decision* ignores Supreme Court precedent that requires states to set compensation rates for local intrastate telecommunications using an FCC pricing model upheld by this Court.

The *Core Decision* departs from that precedent by holding that Section 201 of the Communications Act of 1934 and Section 251(i) give the FCC *ultra vires* ratemaking power over local intrastate telecommunications to impose a mandatory interstate rate for a certain class of intrastate local telecommunications, i.e., local dial-up local calls used to access the internet. The decision is contrary to this Court's ruling that Sections 251(b)(5) and 252(d) of TA-96 limit the FCC to developing rules like a pricing model but require the states to set the rates for local intrastate telecommunications. The decision cannot be distinguished from precedent by claiming that Section 251(i)'s savings clause for Section 201 allows the FCC to reach intrastate telecommunications. The FCC lacked power under Section 201 before 1996 to regulate local intrastate telecommunications rates and TA-96 does not extend the FCC's jurisdiction into setting rates for local intrastate calls. Thus, there was no FCC

authority to impose rates for local intrastate telecommunications to save. *AT&T*, 525 U.S. at 384-85.

Second, the *Core Decision* ratifies the FCC's arbitrary and capricious abandonment of the Court-approved Total Element Long Run Incremental Cost (TELRIC)[2] pricing model, a model that requires the inclusion of joint and common network costs, in favor of an arbitrary rate that: (1) bears no relationship to actual cost, by the FCC's own admission;[3] (2) mandates a rate that is so far below cost-based TELRIC rates as to be unjust and confiscatory; and (3) overturns the states' right to set rates for local calls upheld by this Court.

Third, the *Core Decision* reflects the FCC's explanation that a mandatory interstate rate for local intrastate telecommunications is required because of alleged "rate arbitrage" attributed to "traffic imbalances" in the market for local intrastate telecommunications calls used to access the internet.

---

[2] TELRIC is the formula used by state commissions to determine the rates for the use of equipment and facilities already in place. Rather than encourage competitive carriers to construct new and separate networks in order to enter the market, the FCC required incumbent carriers to lease their equipment and facilities to the competitors. TELRIC determines the payment for those leases. First Report and Order, ¶¶ 690-698. This Court approved TELRIC. *Verizon v. FCC*, 535 U.S. at 468.

[3] *Order on Mandamus*, 24 FCC Rcd 6475, ¶ 24 (2008), Core Pet. App. 41a. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, ¶ 7 (2001) (ISP Remand Order)*, Core Pet. App. 891a-892a

In fact, the FCC decision ratifies some carriers' changed interests reflected in their business plans at the expense of other carriers but in a manner that is without policy justification, is contrary to this Court's precedent, and overturns the states' right to set local rates for local calls as required by this Court's precedent.

The FCC's claim that it is remedying "rate arbitrage" attributed to "traffic imbalances" is disingenuous. Asymmetrical traffic flows existed in the intrastate local calling markets *before* end-user customers started making local dial-up calls to access the internet. Indeed, cost-based reciprocal compensation is necessary precisely because of asymmetrical flows and economies of scale. Those imbalances and asymmetrical compensation initially favored *incumbents* over *competitors* because competitors have fewer customers compared to incumbents in the market for delivery of narrowband voice.

The *Core Decision* ignores precedent, abandons the FCC's pricing model, confiscates smaller carriers' property, and replaces the states right to set intrastate rates with a mandatory interstate rate of $.0007 per MOU for local intrastate calls that bear no relationship to cost.[4]

A writ is needed to prevent the significant harm sure to follow if, as the FCC has stated, the legal theory

---

[4]*Order on Mandamus*, Core Pet. App. 41a; ISP Remand Order, Core Pet. App. 891a-892a.

in the *Core Decision* allows the FCC to impose mandatory federal rates on all telecommunications, including intrastate telecommunications, a claim far beyond the confines of existing law. *Compare Order on Mandamus*, ¶¶ 6-7, 28 and 29, Core Pet. App. 23a, and 45a, Appendix A, ¶¶ 198, 205, 221, Core Pet. App. 249a-250a, 256a, 271a and Appendix C, ¶¶ 200, 216, Core Pet. App. 592a, 606a-607a *with Iowa*, 219 F.3d at 757.

REASONS FOR GRANTING THE PETITION

I. THE *CORE DECISION* ERRONEOUSLY ALLOWS THE FCC TO USURP THE STATES' RIGHT TO SET LOCAL INTRASTATE TELECOMMUNICATIONS RATES AS REQUIRED BY THIS COURT AND REPLACES THOSE STATE RATES WITH A MANDATORY FCC RATE OF $.0007.

The Court must grant a writ of certiorari to correct the United States Court of Appeal for the District of Columbia's (DC Circuit Court) departure from prior rulings of this Court.

The current precedent of this Court holds that Section 251(b)(5) and Section 252(d) of the Telecommunications Act of 1996 (TA-96) limits the FCC's authority to establishing a pricing model for intrastate telecommunications subject to reciprocal compensation under Section 251(b)(5) and Section 252(d) and requires the states to set intrastate reciprocal compensation rates based on the FCC's pricing model, in this case the TELRIC model. *AT&T*,

525 U.S. at 384-385 (1999); *Iowa*, 219 F.3d at 757; *Verizon v. FCC*, 535 U.S. 467, 468 (2002).

The *Core Decision* concludes that the FCC has a newly-discovered authority under Section 201 to impose a mandatory interstate wholesale interconnection rate which replaces state-set rates for intrastate communications. *Compare* Core Pet. App. 5a and 10a.

The departure from precedent in this *Core Decision* tramples the states' right to set rates for intrastate local calls.

The PaPUC requests a Writ of Certiorari to rectify the FCC and lower court's mistaken conclusion that Section 201 of the Communications Act of 1934 allows the FCC to ignore this Court's precedent on who establishes the model (the FCC) and who sets the resulting rates (the states) for local intrastate telecommunications under TA-96. *AT&T*, 525 U.S. at 384-85; *Iowa*, 219 F. 3d at 757; *Verizon v. FCC*, 535 U.S. at 468.

This interminable litigation on jurisdiction over the pricing model and the resulting rate when a local intrastate call is used to access the internet had its genesis in the FCC's First Report and Order issued pursuant to the Telecommunications Act of 1996. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order*).

There, the FCC found that it could set proxy rates and that the FCC would develop the cost model for those rates. The model developed and adopted is the TELRIC model. *Id.* at ¶¶ 113, 625, 672, and 690-698 .

In decisions starting in 1999, the Supreme Court affirmed the FCC by holding that the states were required to set rates based on the pricing model developed by the FCC, since the FCC had no authority of its own to set intrastate rates under Section 252. *See AT&T*, 525 U.S. at 384-385 (1999); *Verizon v. FCC*, 535 U.S. at 468.

The Eighth Circuit, however, vacated an FCC attempt to force states to use the FCC's "proxy" rates when setting Section 252 reciprocal compensation rates based on the TELRIC model. *Iowa*, 219 F. 3d at 757.

Importantly, the Eighth Circuit read this Court's precedent in *AT&T* to require the FCC to establish only the pricing model and left it to the states to apply the model to the facts and thereafter set reciprocal compensation rates. *Iowa*, 219 F.3d at 757.

While this jurisdictional issue was being litigated, the market for local intrastate telecommunications underwent an unanticipated change with the explosion in the use of local telephone calls to access an internet service. At that time, the competitive market for traditional local calls and the long-standing asymmetrical traffic flows based on market share experienced a paradigm shift because competitors acquired many dial-up customers from incumbents.

As a result, the incumbents saw their interests change. With that, their prior support for reciprocal compensation rates set by the state commissions changed to opposition to those rates. Those carriers sought a federal solution favoring a uniform rate.

Those carriers asked the FCC to remedy a new problem they described as reciprocal compensation rate imbalances. Some carriers concluded that a federal solution was necessary to overturn state-established reciprocal compensation rates notwithstanding this Court's precedent holding that states set rates for intrastate local calls based on the approved TELRIC model.

The FCC first attempted to provide those carriers with a federal remedy to the issue of compensation for intrastate local calls used to access the internet in the *1999 Declaratory Ruling. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶¶ 1, 10-12 (1999) (*1999 Declaratory Ruling*), Core Pet. App. 1033a-1035a and 1043a-1046a.

In that decision, the FCC found that intrastate local calls that originate and terminate within a state are not local because they do not "terminate" at the ISP's premises. The FCC explained that, while the *physical facilities* originated and terminated a call within a state at the ISP's premises, the *service* removed the compensation determination for that traffic outside the states' authority under Section 251(b)(5), despite the FCC's earlier conclusion that all local telecommunications were subject to

Section 251(b)(5). *1999 Declaratory Ruling* (emphasis added), Core Pet. App. 1040a-1041a, 1043a, 1045a-1046a.

The FCC reasoned that the terminated local dial-up telephone calls that originated and terminated within a state did not really end at the carrier's physical facilities but, instead, the call actually terminated at a website. Absent a finding that the call did not end where the call terminated, a carrier's call that originates and terminates at the ISP's premises would be subject to compensation based on state-set rates under Sections 251(b)(5) and 252(d)(2). *Id.* ¶ 12, Core Pet. App. 1045a-1046a.

The DC Circuit Court rejected this reasoning. The Court faulted the FCC for inadequately explaining why its "end-to-end" jurisdictional analysis of *the service* was relevant to its decision on the legal authority over an intrastate local call. The Court questioned how carrier calls that terminated on the carriers' *facilities* at the ISP's premises were not considered "local" and not subject to Section 251(b)(5). *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3, 5, 8 (D.C. Cir. 2000). Core Pet. App. 1018a, 1020a, 1023a-1024a (*Bell Atlantic*) (emphasis added).

Following that reversal, the FCC tried a second rationale to explain the FCC's authority to impose a federal solution for intrastate local calls in the *ISP Remand Order*. There, the FCC concluded that intrastate local calls which terminated at an ISP's premises were "information access" service subject to Section 251(g) of the Act. Core Pet. App. 911a.

The FCC also relied on its general rulemaking authority under Section 201 of the Act to prohibit state rates as the FCC now sets rates and rules for this traffic as part of an "interim" solution pending final resolution of intercarrier compensation. Core Pet. App. 950a-956a, 956a-957a.

However, the FCC conceded that, if the call originated and terminated within a state at an ISP's premises, the call would be within the ratemaking authority of states under Section 251(b)(5). *ISP Remand Order*, ¶¶ 32, 77-82, Core Pet. App. 911a, 950a-956a.

The DC Circuit Court rejected this second explanation but failed to overturn the interim rules. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) (*WorldCom*), Core Pet. App. 872a, 878a-879a, and 881a.

The lower court also ruled that Section 251(g) did not provide a basis for the FCC's decision. The Court lacked a meaningful context for reviewing the merits of the interim compensation regime despite sustaining the interim regime. Core Pet. App. 880a.

The issue languished for years. Finally, Core filed a writ of mandamus asking the DC Circuit Court to require the FCC to explain the legal basis for the rules and rates set out in the *ISP Remand Order*. *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (*In re Core*), Core Pet. App. 792a-818a.

The Court's order granting mandamus noted that, if an ISP-bound call was governed by

Section 251(b)(5), reciprocal compensation would be required for the ILEC-to-CLEC hand-off and ILECs would be required to compensate other CLECs for completing their customer calls. *In re Core*, 531 F. 3d at 851, Core Pet. App. 794a.

The Court criticized the FCC's delay in responding to the *WorldCom* decision as "egregious," and "grant[ed] the writ of mandamus and direct[ed] the FCC to respond to [the Court's] 2002 *WorldCom* remand by November 5, 2008." *In re Core*, 531 F. 3d at 850, 861-62, Core Pet. App. 793a.

"That response," the Court continued, "must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)." *In re Core*, 531 F. 3d at 862, Core Pet. App. 816a. "No extensions of this deadline will be granted," and "[t]he rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date." Id. at *862*, Core Pet. App. 816a.

At 11:52 p.m. on November 5, 2008, the FCC filed the *Order on Mandamus* with the Court. The FCC now ruled that all telecommunications exchanged by Local Exchange Carriers, including telecommunications which originated and terminated within a state at the carrier's facilities on behalf of its ISP customer, are subject to Sections 251(b)(5) and 252(d). *Order on Mandamus*, ¶15, Core Pet. App. 31a.

The FCC recognized that Section 251(b)(5) defines the scope of traffic subject to reciprocal compensation and that Section 252(d)(2)(A)(i) deals with who pays what to whom. Core Pet. App. 29a.

The FCC went on to say that a carrier's telecommunications for its ISP customers that terminate at the ISP's premises is just like telecommunications to other customers. Core Pet. App. 29a-30a. In spite of this, the FCC then concluded that an intrastate local dial-up call that originated and terminated within a state at an ISP's premises was just like other local calls except that this discrete class of local calls would now be interstate and subject to the FCC's authority. Core Pet. App. 32a.

The FCC justified that result with a conclusion that the FCC's interstate authority under Section 201 sustained jurisdiction by virtue of Section 251(i) and imposition of a mandatory reciprocal compensation rate of $.0007 per MOU even if, by the FCC's own recognition, the rate bore no relationship to actual cost. *Order on Mandamus*, ¶¶ 11, 12, 13, 17, and 24, Core Pet. App. 28a, 29a, 30a, 32a, and 40a-41a.

On January 12, 2010, a three-judge panel issued the *Core Decision* affirming the FCC's *Order on Mandamus*. Core Pet. App. 1a-15a. Core and the Commonwealth of Pennsylvania sought Rehearing. The DC Circuit Court denied those petitions on March 10, 2010, resulting in the writ pending before this Court. Core Pet. App. 1085a-1086a and 1087a-1088a.

Review is appropriate because the *Core Decision* upends precedent by holding that intrastate dial-up

local calls, which originate and terminate within a state at an ISP's premises, after which the ISP reformats the call in order to provide an unregulated information service, i.e., internet access, now brings this discrete class of terminated intrastate local calls within the FCC's exclusive interstate jurisdiction.

The FCC's claim that an ISP's delivery of an unregulated information *service* transforms the terminated local intrastate call on *facilities* into an "interstate" call is untenable. The FCC attempts to distinguish precedent by focusing on a *service* to make a jurisdictional determination on setting *rates* for access to *facilities*. By failing to consider the calls use of carriers' facilities, the FCC effectively ignores or rejects this Court's precedent in order to mandate an interstate wholesale intercarrier compensation rate of $.0007 for a local intrastate call.

The states developed rates for local intrastate telecommunications based on the FCC's TELRIC model as required by prior rulings of this Court. That precedent holds that the FCC's authority in Sections 251(b)(5) and 252(d) is limited to developing a pricing model and that the states are responsible for setting intrastate rates based on that model. Moreover, the FCC has not alleged that the states are misapplying the TELRIC model.

The Commonwealth of Pennsylvania seeks a writ of certiorari so that this Court can affirm that precedent and conclude that calls on *facilities*, which originate and terminate within a state, remain intrastate local calls subject to this Court's precedent regardless of the nature of *any subsequent service*

rendered following termination of that intrastate local call. Such a view is entirely consistent with the states' prior pleading and other FCC decisions. *See Brief of the Petitioner and Intervenor States*, C.A. Joint Brief, pp. 30-33; *In re: Time Warner, Inc.*, Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

A writ is necessary so that this Court can resolve this protracted litigation and affirm this Court's holding that, under TA-96, it is *the FCC* that sets the *pricing methodology* for local intrastate calls but it is *the states* that apply that model to the fact and set the resulting *reciprocal compensation rates*.

This Court's precedent does not distinguish the price modeling or rate making authority over local intrastate calls under federal law based on any subsequent reformatting after an intrastate local call originates and terminates within a state. The *Core Decision* does just that and, in so doing, upends precedent by allowing the FCC to assert interstate jurisdiction over intrastate local calls and to replace intrastate rates with a mandatory interstate rate.

II. THE CORE DECISION ERRONEOUSLY AUTHORIZES THE FCC'S ARBITRARY AND CAPRICIOUS ABANDONMENT OF THE COST-BASED TELRIC MODEL, WHICH WAS UPHELD BY THIS COURT AND WHICH THE STATES MUST USE IN SETTING RATES FOR INTRASTATE TELECOMMUNICATIONS.

A writ of certiorari is necessary to prevent the FCC from arbitrarily and capriciously abandoning the TELRIC pricing model approved by this Court. The FCC's decision to jettison a pricing model approved by this Court and extending that abandonment to claim a right to set rates for intrastate local calls that originate and terminate within a state cannot be justified merely because access to the internet follows the termination of that intrastate call.

In addition to the departure from this Court's precedent, the *Core Decision* upholds a rate of $.0007 per MOU, the rate proposed by the FCC in the *Order on Remand* and which rests on four incumbent interconnection agreements of some dominant carriers.[5] The FCC relies on the agreements and rates of the proposing carriers in setting the interstate rate.[6]

---

[5] *ISP Remand Order*, ¶ 85, n.158, Core Pet. App. 959a-960a.

[6] *See ISP Remand Order*, ¶85, Core Pet. App. 959a-960a and *Compare MFS I*, 1995 Pa. PUC Lexis 87 at *68-*80 and *In re City Signal*, 1995 Mich. PSC Lexis 31 (1995) *with Bell Atlantic Ex Parte Filing*, Reciprocal Compensation for Internet Traffic, Correspondence of Edward Young, III and Thomas J. Tauke, July 1, 1998, Docket Nos. 96-98; CCB/CPD 97-30; *Developing a Unified Compensation Regime*, Docket No. 01-92, Ex Parte Letter of Verizon (July 28, 2010) *with ISP Remand Order*, ¶ 8, Core Pet.

footnote continued on next page

The PaPUC contends that imposition of a mandatory federal interstate rate of $.0007 per MOU for local intrastate calls is arbitrary, unlawful and capricious. The decision, with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that, by the FCC's own admission, bears no relationship to cost.[7]

This is arbitrary because it is not consistent with precedent holding that an agency may not depart from a policy *sub silentio*. *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1811 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). In this case, the FCC arbitrarily and capriciously abandoned the TELRIC model upheld by this court *sub silentio*, although Sections 251 and 252 require rates to reflect costs.

The PaPUC also submits that imposing this rate based on the FCC's *sub silentio* abandonment of TELRIC is capricious because the rate is set so far below actual costs as to be unjust and confiscatory. The TELRIC model upheld by this court contained a requirement that rates include a contribution to joint and common costs. *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98 (August 8, 1996) (*First Report*

App. 892a-894a and *Order on Mandamus*, ¶¶ 24 and 25, Core Pet. App. 40a-43a.

[7]*Order on Mandamus*, ¶ 24, Core Pet. App. 40a-41a; *ISP Remand Order*, ¶ 7, Core Pet. App. 891a-892a.

and Order), ¶ 672-698 *AT&T*, 525 at 384-385; *Iowa*, 219 F.3d at 757; *Verizon v. FCC*, 535 U.S. at 468.

The mandatory interstate rate of $.0007 per MOU replaces state-set rates that, in turn, were set by the states as required by this Court's precedent. The FCC ignores that precedent and vacates the rates set by the states to impose a mandatory interstate rate that extends the FCC's jurisdiction well beyond established boundaries.

The resulting mandatory interstate rate is so low as to be unjust, not just because the rate is not based on any methodology but because it reflects a rate in four agreements involving some incumbent carriers. Even if the FCC had authority to impose a rate based on four agreements, this rate is so low that it effectively confiscates other carriers' facilities, including their networks.

This Court's precedent holds that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public interest which is so 'unjust' as to be confiscatory." *Duquesne Light Company v. Barasch*, 488 U.S. 299, 307 (1989) (citing *Covington & Lexington Turnpike v. Sandford*, 164 U.S. 578, 597 (1896)).

In this case, confiscation occurs because smaller carriers or competitors must provide other carriers network access at a mandatory fixed interstate rate that is unjust and confiscatory. The new rate simply bears no relationship to actual cost, by the FCC's own

admission. The rate also rests on the capricious abandonment of the TELRIC model.

This decision clearly is not based on economics. While prior precedent does not require the FCC to establish "purely cost-based rates" for communications, the FCC must specifically justify any rate differential that does not reflect cost. *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, 529 (1996) (*CTA*).

In the *Core Decision*, there is no cost basis for the mandatory interstate rate. The holding in *CTA* that rates need not be "purely" cost based does not mean the FCC can set a rate that has absolutely no basis in cost.

Because the TELRIC model and state-set rates paradigm was abandoned *sub silentio*, the FCC is unable to associate the fixed $.0007 rate to costs, precedent or established policy. Moreover, there is no indication that the FCC even examined any relevant data in order to attempt to articulate a satisfactory explanation for its action as required by this Court's precedent. *Motor Vehicle Mfrs. Assn. of United States Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The FCC's arbitrary, unlawful, and capricious departure from prior policy contravenes precedent of this Court. There is no longer any federal pricing model. The states are no longer setting rates for local intrastate telecommunications based on a federal pricing model. Additionally, the FCC has acted *sub silentio* with no explanation for its new policy imposing

a mandatory, yet confiscatory, interstate rate for local intrastate telecommunications. What remains is the *ultra vires* goal of placing all traffic under one umbrella through the elimination of all jurisdictional and regulatory distinctions.[8]

The abandonment of precedent, the lack of any underlying cost justification for a mandatory interstate rate that supplants state-set rates for local intrastate telecommunications, and the adoption of a new interpretation of law and policy *sub silentio* warrants correction by this Court based on its precedent.

III. THE CORE DECISION ERRONEOUSLY UPHOLDS THE FCC'S *ULTRA VIRES* RATIFICATION OF SOME CARRIERS' BUSINESS INTERESTS IN A MANNER CONTRARY TO PRECEDENT AND WHICH VIOLATES THE STATES' RIGHT TO SET THE RATE FOR LOCAL INTRASTATE TELECOMMUNICATIONS.

A writ is necessary to review the *Core Decision* because the decision wrongly ratifies some carriers' proposals for an interstate rate of $.0007 for intrastate local calls because that rate better reflects their changed business interest. The FCC's action favors some carriers over others with a mandatory rate despite precedent of this Court affirming the TELRIC model.

---

[8]*Compare Order on Mandamus*, ¶¶ 24, 28 and 29, Appendix A at ¶ 221, Core Pet. App. 40a-41a and 45a, Core Pet. App. 271a and Appendix C at ¶ 216, Core Pet. App. 606a-607a.

The *Core Decision* rests on a conclusion that an interstate rate in place of state-set rates for reciprocal compensation for intrastate local calls is needed to remedy "rate arbitrage" attributed to "traffic imbalances."

This is without merit.

A careful analysis of the history of reciprocal compensation rates, including the rates at issue in this writ, demonstrates otherwise. The carriers defending the FCC's federalization of intrastate local calls and the mandatory interstate rate justify the result as a solution to some alleged problem with "rate arbitrage" attributed to "traffic imbalances."

Carriers supporting the FCC's *ultra vires* interstate authority to impose a mandatory interstate rate in place of state-set intrastate reciprocal compensation rates avoid discussing their prior position of support for reciprocal compensation rates for local calling. Incumbents turned against reciprocal compensation rates set by the states in favor of a new mandatory interstate rate of $.0007 only when market and technological changes made a change in their interest necessary.

The PaPUC's experience before 1996 in addressing competition and intercarrier compensation for local intrastate calls is illustrative, particularly regarding the debate on whether "reciprocal compensation" rates or "bill and keep" rates should govern compensation between competitors and incumbents for local intrastate calls. At that time,

many states enacted pro-competitive statutes that authorized certification of CLECs.[9]

A major issue was the compensation a CLEC should pay an ILEC for "transport and termination" service if a CLEC's customer called an ILEC's customer. CLEC customers making local calls were fewer compared to ILEC customers calling CLEC customers.[10]

CLECs asked state commissions to adopt "bill and keep[11], for compensation for intrastate local calls due to their smaller size and the asymmetrical traffic flow. ILECs sought higher "reciprocal compensation" rates[12] given their larger customer base, market share, and resulting economies of scale.

The resulting asymmetrical traffic flow between *incumbents* and *competitors* in the market for intrastate local calls in states with reciprocal compensation before the emergence of dial-up intrastate local calls did not stir incumbents to decry that asymmetry. The incumbents supported "reciprocal compensation" rates set by the states because they

---

[9]1993, July 8, P.L. 456, No. 67, 66 Pa.C.S. § 3009(a); 66 Pa.C.S. § 3019. These provisions authorized the PaPUC to grant CLECs certificates to operate in local exchange territories. The first expired on December 31, 2003. The successor version was enacted in 2004. See Nov. 30, P.L 1308, Act 183.

[10]*MFS I*, 1995 Pa. PUC Lexis 87 at *68-80.

[11]*MFS I*, *68-80. "Bill and Keep" is a pricing scheme where all networks would agree to terminate calls from other networks at no charge.

[12]*MFS I*, *68-80. Reciprocal compensation rates would require payment for the use of local facilities.

benefitted from the asymmetrical traffic flow. Their support changed when the money stopped flowing in their direction.

The change stemmed from the use of a local intrastate call, a call which originates and terminations within a state's boundary, to access the internet using the local telephone line. Those calls were markedly longer than traditional local intrastate local calls.

Suddenly, incumbent or larger carriers no longer received payments from competitors. Instead, competitive carriers were receiving payments from incumbents. Competitors were more successful than the incumbents in attracting customers for the delivery of local dial-up calls. Accordingly, it was the competitors success in receiving payments for one-directional calling, albeit at TELRIC rates, which concerned the incumbents even if it reflected ISP customers' desire to make, but not receive, local calls.[13]

Some carriers witnessed this previously favorable asymmetrical traffic flow and decried the compensation structure. They sought a federal solution. Ten years later, the litigation attributed to the changed business interest has culminated in this *Core Decision*.[14]

---

[13]Any focus on one-directional calling ignores market demand and actually supports rates based on cost, i.e., TELRIC. A mandatory interstate rate of $.0007 is not consistent with TELRIC.

[14]*Compare MFS I* at *68-80 *with Bell Atlantic Ex Parte Filing*, Reciprocal Compensation for Internet Traffic, Correspondence of Edward Young, III and Thomas J. Tauke, July 1, 1998, Docket Nos. 96-98; CCB/CPD 97-90; *ALTS Ex Parte Filing*, Request for

footnote continued on next page

It was a change in business interest, not any concern with asymmetrical traffic flow, *per se*, that is at issue in the *Core Decision*.

The FCC remedied a revenue imbalance and a change in business interest arising because smaller competitive carriers were out-competing incumbents and acquiring ISPs as customers.

The FCC's remedy is to adopt the incumbents' proposed $.0007 rate as a mandatory interstate rate. The FCC's remedy ignores precedent of this Court and rests on an arbitrary abandonment of a cost model upheld by this Court.

In addition, the *Core Decision*'s reliance on the savings clause of Sections 251(i) to justify imposition of a mandatory interstate rate of $.0007 per MOU for intrastate local calls, as justified by Section 201 due to the "special nature" of dial-up local calls, is untenable.

Section 251(i) preserves the FCC's 1934 authority in Section 201 over interstate telecommunications. Nonetheless, this case is ultimately not about the FCC's 1934 authority over interstate facilities or services.

This case is about the FCC's attempt to enlarge Section 201 using Section 251(i) far beyond the power over interstate communications granted in 1934. The FCC intends to use Section 201 to replace state rates

---

Expedited Letter Clarification, July 2, 1998, Docket Nos. 96-98; CCB/CPD 97-30.

for intrastate communications with a uniform FCC rate for *all* communications. *Compare Mandamus Order*, ¶¶28 and 29, Core Pet. App. 45a *with* Appendix A, ¶221, Core Pet. App. 271a.

This appeal turns on the *Core Decision*'s conclusion that Sections 251(i) and 201 constitute an intersection that allows the FCC to arbitrarily, unlawfully, and capriciously discard the TELRIC pricing model and impose an interstate rate using the savings clause of Section 251(i) for Section 201. The FCC then would be able to totally remove state authority to set intrastate rates. *Compare ISP Remand Order*, ¶82. Core Pet. App. 956a-957a *with Order on Mandamus*, ¶¶28-29, Core Pet. App. 45a and App. C, ¶216, Core Pet. App. 606a-607a.

However, there was no FCC intrastate authority in Section 201 that could have been saved by Section 251(i). Prior to the 1996 Act and this Court's precedent, the FCC lacked power to impose a pricing model, let alone rates, on intrastate communications.

The 1996 Act altered the balance between intrastate and interstate authority by authorizing the FCC to promote local competition. However, this Court's precedent interpreting that altered balance does not give the FCC jurisdiction to set the rates for local intrastate telecommunications.

Instead, this Court's precedent reconciled the FCC's 1934 authority with the FCC's 1996 authority and with the states' traditional authority. This Court held that the states must set reciprocal compensation rates for local intrastate calls using the FCC's TELRIC

model. *AT&T*, 525 U.S. at 384-385; *Iowa*, 219 F.3d at 757; *Verizon v FCC*, 535 U.S. at 468.

This Court's precedent reconciling the 1934 Act with the 1996 Act did not differentiate between local intrastate telecommunications based on some reformatting that occurs after a local intrastate call is terminated.

The FCC attempts to insert that distinction in order to ratify some proponents' changed interests. The FCC effectuates that distinction by conflating the *facilities* where a local call originates and terminates with any *service* that may be provided. By focusing on the service rather than the facility, the FCC tries to justify its assertion of federal jurisdiction and thus transforms a local intrastate call into an interstate matter subject to a mandatory interstate rate. In so doing, the FCC summarily removes any state ratemaking authority, possibly raising Tenth Amendment questions.

Moreover, the FCC's own precedent carefully distinguishes between the *facilities* and the jurisdiction over *facilities* independent of any service provided over those facilities. *In re: Time Warner, Inc.*, Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

In the case at hand, the origination and termination of a local intrastate call occurs on *facilities*

independent of the service provided over those *facilities*. Consequently, the *Core Decision* is inconsistent with this Court's precedent and the FCC's own approach.

IV. THE LEGAL PREMISE UPHELD IN THE CORE DECISION HAS RAMIFICATIONS FAR BEYOND THIS CASE.

The PaPUC's concern is heightened because the FCC's legal theory, upheld in the *Core Decision*, could be extended to other intrastate local calls and compensation rates – matters that go far beyond the boutique market for intrastate dial-up local calls. *Compare Order on Mandamus*, at ¶¶ 6-7, 28 and 29, Core Pet. App. 23a-24a and 45a; Appendix A at ¶ 205 and 221, Core Pet. App. 256a and 271a, and Appendix C at ¶ 200 and 216, Core Pet. App. 592a and 606a-607a *with AT&T*, 525 U.S. at 384-385; *Iowa*, 219 F.3d at 757; and *Verizon v. FCC*, 535 U.S. 468.

The FCC apparently intends to apply this new legal interpretation well beyond the boutique market for local intrastate calls to access the internet[15] and thereby contradicts the lower court's finding that "a local chat with a schoolmate about the evening's homework would not – at least under conditions typical today – involve interstate communications . . . ." *Compare Order on Mandamus*, ¶¶ 6-7, 28 and 29, Core Pet. App. 23a-24a and 45a, Appendix A, ¶¶ 205 and 221, Core Pet. App. 256a and 271a, and Appendix C, ¶¶ 200 and 216, Core Pet. App. 592a and Core Pet App.

---

[15] *Mandamus Order* at ¶¶ 28 and 29, Core Pet. App. 45a.

606a-607a *with Core Decision*, 592 F.3d 139, 144 (D.C. 2010), Core Pet. App. 8a.

The *Order on Mandamus* leaves few illusions about the FCC's long-term view of its jurisdiction. The FCC reiterates "its intention to move to a more unified intercarrier compensation regime." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a. The FCC later repeats its commitment "to moving towards a more unified intercarrier compensation regime, as evidenced by the Further Notice issued in conjunction with this Order." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a. The FCC makes it clear that it intends to maintain the $.0007 cap and the mirroring rule pursuant to our section 201 authority." *Order on Mandamus* at ¶ 29, Core Pet. App. 45a.

In the Further Notice, incorporated by reference in the ISP Remand Order, the FCC's view is pronounced in the Appendices. Although the FCC admits that the $.0007 rate bears no relationship to "actual cost," it takes a different view in Appendix A. *Compare Order on Mandamus* at ¶ 28, Core Pet. App. 45a *with* Appendix A at ¶¶ 198, 202 and 221, Core Pet. App. 249a-250a, 254a, 271a.

The FCC considers the $.0007 compensation rate an "interim intercarrier compensation regime" but concludes "that it is appropriate to retain these rules, but only on a transitional basis *until a state commission, applying the 'additional costs' standards adopted in this order, has established reciprocal compensation rates that are at or below $.0007 per minute-of-use.*" *Order on Mandamus*, Appendix A at ¶ 198, Core Pet. App. 249a-250a (emphasis added).

The FCC also states its expectation that "state commissions, applying the new 'additional costs' standard adopted in this order, will set final reciprocal compensation rates at or below $.0007 per minute-of-use." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a, Appendix A at ¶ 202, Core Pet. App. 254a.

The FCC's reliance on Section 201 is reflected in its intention to "maintain the $.0007 cap and the mirroring rule, on a transitional basis, pursuant to our section 201 authority." *Order on Mandamus* at ¶ 29, Core Pet. App. 45a. This underscores the importance of the need to review the *Core Decision*.

The FCC's view of federalism is clear. The FCC states that "[b]y placing all traffic under the umbrella of one compensation scheme, *we eliminate jurisdictional and regulatory distinctions* that are not tied to economic or technical differences between services." *Order on Mandamus*, Appendix A at ¶ 221, Core Pet. App. 271a (emphasis added). The FCC ignores not only limitations of the 1934 Act but also this Court's interpretation of the 1996 Act in an effort to dismantle jurisdictional and regulatory distinctions. The FCC elevates economic or technical differences over a federalist structure.

The FCC repeats its reasoning and reiterates its intention to "maintain the $.0007 cap and the mirroring rule, on a transitional basis, pursuant to our section 201 authority." *Compare Order on Mandamus* ¶ 29, Core Pet. App. 45a *with* Appendix C at ¶ 200, Core Pet. App. 592a. The FCC repeats its goal to place "all traffic under the umbrella of one compensation scheme" in order to "eliminate jurisdictional and regulatory

distinctions that are not tied to economic or technical differences between services." *Order on Mandamus*, Appendix C at ¶ 216, Core Pet. App. 606a-607a.

The FCC's interpretation of law is focused on going beyond the discrete class of dial-up local intrastate calls. The FCC's goal of usurping states' rights has become more pronounced and likely is only emboldened by the *Core Decision*.

For example, the FCC recently decried intercarrier compensation because "[t]he current ICC system also has fundamental problems that create inefficient incentives." FCC's National Broadband Plan, March 2010 at 142. The FCC expressed concern about "unproductive economic activity" because "terminating rates are not uniform despite the uniformity of the function of terminating a call." FCC's National Broadband Plan, March 2010 at 142. The FCC notes that "[r]ates vary from zero to 35.9 cents per minute, depending on the jurisdiction of the call, the type of traffic and the regulatory status of the carrier." FCC's National Broadband Plan, March 2010 at 142-43.

The FCC's intention to use its new legal interpretation well beyond the boutique market for local intrastate calls to access the internet contradicts the lower court's finding that a local chat about homework would be unaffected. *Compare ISP Remand Order*, ¶¶ 6-7, 28 and 29, Core Pet. App. 23a and 45a, Appendix A, ¶¶ 198, 205 and 221, Core Pet. App. 249a-250a, 256a, 271a and Appendix C, ¶¶ 200 and 216, Core Pet. App. 592a and 606a-607a *with Core Decision*, 592 F.3d 139, 144 (D.C. Cir. 2010), Core Pet. App. 8a.

Precedent does not require the FCC to establish "purely cost-based rates" for communications. *CTA*, 87 F.3d at 529. The *CTA* decision holds that rates need not be "purely" cost based. This decision, however, does not mean that the FCC can set a rate that has absolutely no basis in cost.

Precedent requires the FCC to develop a cost model which the states use to set intrastate rates. This precedent does not authorize the FCC to ignore constitutional limitations and impose a mandatory interstate rate on a discrete class of local intrastate telecommunications. Precedent certainly does not allow the FCC to simultaneously expand this usurpation to other local intrastate telecommunications.

The issue before this Court goes well beyond the narrow confines of dial-up local calls that terminate within a state. The trampling of precedent and the threat to federalism, Congressional intent, and this Court's precedent identified in this petition for writ of certiorari to the *Core Decision* can only be stopped by a grant of review.

CONCLUSION

For these reasons, a writ of certiorari is appropriate.

Respectfully submitted,

BOHDAN R. PANKIW
KATHRYN G. SOPHY
JOSEPH K. WITMER
COUNSEL OF RECORD
Commonwealth of Pennsylvania
Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000
Counsel for Petitioner
Pennsylvania Public Utility
Commission

RELEVANT STATUTORY PROVISIONS

47 U.S.C. § 201 provides as follows:

§201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not con-

trary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 251 provides as follows:

§251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on,

the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain

to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly

economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a

rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) 'Incumbent local exchange carrier"defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252 provides as follows:

§252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any

other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State

commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier

of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its

review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a

determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsidera-

tion thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a

reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) 'Incumbent local exchange carrier"defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

172

(3) (2)

Nos. 10-185 and 10-189

In the Supreme Court of the United States

CORE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

AUSTIN C. SCHLICK
General Counsel

RICHARD K. WELCH
Deputy Associate General Counsel

MAUREEN K. FLOOD
Counsel
Federal Communications Commission
Washington, D.C. 20554

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 47 U.S.C. 201(b), which empowers the Federal Communications Commission to regulate the rates charged for interstate communications services, authorizes the agency to regulate the rates charged between carriers that carry dial-up Internet access traffic.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 12
Conclusion 25

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 3, 18, 19, 20
Bell Atl. Tel. Cos. v. *FCC*, 206 F.3d 1 (2000) 6, 7, 9
Board of Regents of the Univ. of Wash. v. *EPA*, 86 F.3d 1214 (D.C. Cir. 1996) 16
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 25
Comcast Corp. v. *FCC*, 600 F.3d 642 (D.C. Cir. 2010) 25
Competitive Telecomms. Ass'n v. *FCC*, 87 F.3d 522 (D.C. Cir. 1996) 21
Core Commc'ns, In re:
455 F.3d 267 (D.C. Cir. 2006) 23
531 F.3d 849 (D.C. Cir. 2008) 9
Core Commc'ns, Inc. v. *FCC*, 545 F.3d 1 (2008) 10
Duignan v. *United States*, 274 U.S. 195 (1927) 16
Gallenstein v. *United States*, 975 F.2d 286 (6th Cir. 1992) 15
Global Crossing Telecomms., Inc. v. *Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007) 3, 12, 17, 24
Hemenway v. *Peabody Coal Co.*, 159 F.3d 255 (7th Cir. 1998) 14

Cases—Continued: Page

Illinois Bell Tel. Co. v. *FCC*, 911 F.2d 776 (D.C. Cir. 1990) 16
Iowa Utils. Bd. v. *FCC*, 219 F.3d 744 (8th Cir. 2000), aff'd in part and rev'd in part, 535 U.S. 467 (2002) 18, 20
Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986) 2
Minnesota Pub. Util. Comm'n v. *FCC*, 483 F.3d 570 (8th Cir. 2007) 25
Morales v. *TWA*, 504 U.S. 374 (1992) 17
National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 14
Ohio Power Co. v. *FERC*, 954 F.2d 779 (D.C. Cir.), cert. denied, 506 U.S. 981 (1992) 14
United States v. *Galletti*, 541 U.S. 114 (2004) 16
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 15
Verizon Commc'ns, Inc. v. *FCC*, 535 U.S. 467 (2002) 18, 19, 20
Verizon New England, Inc. v. *Maine Pub. Utils. Comm'n*, 509 F.3d 1 (1st Cir. 2007) 13
WorldCom, Inc. v. *FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 538 U.S. 1012 (2003) 8

Statutes and regulation:

American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(A), 123 Stat. 516 (47 U.S.C. 1305(k)(2)(A)) 24
Communications Act of 1934, 47 U.S.C. 151 *et seq.* 2
47 U.S.C. 151 2

Statutes and regulation—Continued: Page

47 U.S.C. 152(b) 19
47 U.S.C. 153(43) 9
47 U.S.C. 201 ..... *passim*
47 U.S.C. 201(b) ..... *passim*
47 U.S.C. 203 18
47 U.S.C. 204 18
47 U.S.C. 205 17
47 U.S.C. 251 ..... 3, 4, 10, 11, 14, 15
47 U.S.C. 251(b)(5) ..... *passim*
47 U.S.C. 251(g) 7, 8
47 U.S.C. 251(i) ..... *passim*
47 U.S.C. 252 ..... 11, 12, 14, 15, 18, 19
47 U.S.C. 252(a) 3
47 U.S.C. 252(b) 3
47 U.S.C. 252(c) 3
47 U.S.C. 252(c)(2) 20
47 U.S.C. 252(d)(2)(A) 17, 18
47 U.S.C. 405(a) 18
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 3
49 U.S.C. App. 1506 (1988) 17
47 C.F.R. 51.701(a) (1999) 6

Miscellaneous:

Connect America Fund, In re, 25 F.C.C.R. 6657 (2010) 24

Miscellaneous—Continued: Page

Framework for Broadband Internet Serv., In re, 25 F.C.C.R. 7866 (2010) 23

John B. Horrigan, *Broadband Adoption and Use in America* (FCC, OBI Working Paper Series No. 1, 2010) 23

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, In re:

14 F.C.C.R. 3689 (1999), vacated, *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1 (2000) 4, 5

16 F.C.C.R. 9151 (2001) ..... *passim*

Press Release, *FCC Sends National Broadband Plan to Congress*, (Mar. 16, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf ... 24

In the Supreme Court of the United States

No. 10-185

CORE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 10-189

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 592 F.3d 139. The order of the Fed-

[1] All citations to the petition appendix are to the appendix filed in No. 10-185.

eral Communications Commission (Pet. App. 15a-791a) is reported at 24 F.C.C.R. 6475.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2010. Petitions for rehearing were denied on March 26, 2010 (Pet. App. 1085a-1088a). On June 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 10-185 to and including July 23, 2010. On July 14, 2010, the Chief Justice further extended the time in No. 10-185 to August 6, 2010. On June 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 10-189 to August 6, 2010, and both of the petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, empowers the Federal Communications Commission (FCC or Commission) to regulate the rates, terms, and conditions of interstate telecommunications. "In broad terms, the Act grants to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication.'" *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986) (quoting 47 U.S.C. 151). The Act requires that regulated carriers' "charges, practices, classifications, and regulations for and in connection with" interstate telecommunications services be "just and reasonable." 47 U.S.C. 201(b). The Communications Act authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out" that requirement, as well as other provisions of the Act. *Ibid.*

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of Title 47 of the United States Code), amended and was inserted into the Communications Act. The 1996 Act "fundamentally restructure[d] local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T*). Under the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent [local exchange carriers] are subject to a host of duties intended to facilitate market entry" by new competitors. *Ibid.*

Among those duties is the requirement in Section 251 that local exchange carriers "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). "Reciprocal compensation arrangements require that when a customer of one carrier makes a local call to a customer of another carrier (which uses its facilities to connect, or 'terminate,' that call), the originating carrier must compensate the terminating carrier for the use of its facilities." Pet App. 3a. Incumbent carriers and new entrants may voluntarily negotiate contracts (called interconnection agreements) to satisfy these market-opening duties. 47 U.S.C. 252(a). But if private negotiations fail, disputed issues are referred to state commissions for compulsory arbitration, which is subject to FCC rules promulgated under Section 251. See 47 U.S.C. 252(b) and (c); see also *AT&T*, 525 U.S. at 371-373.

Although the 1996 Act fundamentally restructured local telecommunications markets, it preserved the FCC's long-standing authority over interstate services. See *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 50 (2007) (The 1996 Act "left many traditional requirements and related statu-

tory provisions, including [Section] 201(b) * * * in place."). In particular, the 1996 Act provides that "[n]othing" in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." 47 U.S.C. 251(i).

2. This case involves payments made between carriers that cooperate to carry "dial-up" traffic between customers and the Internet. Under a typical dial-up arrangement, a customer of an Internet Service Provider (ISP) directs his or her computer modem to dial a telephone number, thereby using the telephone network of his local exchange carrier, as well as the network of the carrier providing service to the ISP. The ISP, in turn, enables the customer to access Internet content and services from distant websites over the telephone connection. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 3689, 3691 (1999) (¶ 4) (*Declaratory Ruling*), vacated, *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1 (2000). After enactment of the 1996 Act, a number of state commissions interpreted existing interconnection agreements to subject these communications to the reciprocal compensation obligations of the statute. Under that approach, the ISP customer's carrier was required to pay the ISP's carrier on a per-minute basis for "termination" of a call every time the customer dialed in. 47 U.S.C. 251(b)(5).

The FCC has explained that per-minute reciprocal compensation schemes make sense in the context of voice traffic on telecommunications networks because incoming and outgoing voice traffic tends to be "relatively balanced." See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C.R. 9151, 9162 (2001) (¶ 20) (*ISP Re-*

mand Order). Unlike telephone voice traffic, however, "traffic to an ISP flows exclusively in one direction"—from the LEC customer who initiates the connection to the ISP that connects to the Internet—"creating an opportunity for regulatory arbitrage and leading to uneconomical results." *Id.* at 9162 (¶ 21). As the Commission explained,

> [i]t was not long [after enactment of the 1996 Act] before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.

Ibid.; see Pet. App. 4a.

3. In 1999, the Commission began an effort to counteract the economic distortions that resulted from the state commission decisions "applying the reciprocal compensation system to ISP-bound traffic." Pet. App. 4a. Employing its "traditional[]" end-to-end analysis to determine whether a particular call falls within the FCC's jurisdiction over interstate communications or the States' jurisdiction over intrastate traffic, the FCC concluded that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." *Declara-*

tory Ruling, 14 F.C.C.R. at 3699 (¶ 13). This approach accorded with Commission precedent that regulated interstate wire communication "from its inception to its completion," *id.* at 3696 (¶ 11), and with the practical reality of dial-up Internet access, taking into account "the totality of the communication," *id.* at 3698 (¶ 13). In its 1999 ruling, the Commission concluded that dial-up Internet traffic "do[es] not terminate at the ISP's local server * * * but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Id.* at 3697 (¶ 12). In light of that finding, the FCC determined that ISP-bound calls were not "local" within the meaning of agency rules that (at that time) limited the Section 251(b)(5) reciprocal compensation requirement to "local traffic." *Id.* at 3690 (¶ 1); see 47 C.F.R. 51.701(a) (1999).[2]

On petitions for review, the D.C. Circuit recognized that "the Commission has historically been justified in relying" on its "end-to-end analysis" "when determining whether a particular communication is jurisdictionally interstate." *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1, 5 (2000) (*Bell Atlantic*). The court did not question the applicability of that analysis to dial-up Internet traffic. The court held, however, that "the Commission ha[d] not supplied a real explanation for its decision to treat end-to-end analysis as controlling" the question whether such traffic was "local" under the agency's regulations

---

[2] The Commission concluded that it did not "have an adequate record upon which to adopt a rule regarding inter-carrier compensation for ISP-bound traffic." *Declaratory Ruling*, 14 F.C.C.R. at 3707 (¶ 28). In the absence of such a rule, the agency determined that carriers "should be bound by their existing interconnection agreements, as interpreted by state commissions." *Id.* at 3690 (¶ 1).

and thus subject to reciprocal compensation obligations. *Id.* at 8; see *id.* at 5.

On remand, the FCC found that ISP-bound traffic was excluded from the 1996 Act's reciprocal compensation obligation by 47 U.S.C. 251(g), which requires LECs to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations * * * that apply to such carrier on the date immediately preceding" the date of enactment of the 1996 Act. See *ISP Remand Order*, 16 F.C.C.R. at 9152-9153 (¶ 1), 9166-9167 (¶¶ 32-36).[3] The Commission also suggested that a "bill and keep regime," under which carriers recover their costs from their end-user customers rather than from the other carriers involved in transmitting a call, might eventually "eliminate" the "opportunity for regulatory arbitrage." *Id.* at 9184 (¶ 74).

Pending the possible establishment of a permanent intercarrier rate structure, the Commission adopted an interim payment regime intended to "limit, if not end, the opportunity for regulatory arbitrage." *ISP Remand Order*, 16 F.C.C.R. at 9187 (¶ 77). The first component of the interim rate regime consisted of caps on the rates for ISP-bound traffic, beginning at $.0015 per minute of use and declining to $.0007 per minute of use. See *id.* at

---

[3] In its remand order, the Commission also abandoned its previous view that Section 251(b)(5) applied to only "local" traffic. *ISP Remand Order*, 16 F.C.C.R. at 9167 ¶ 34 ("We * * * refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in [S]ection 251(b)(5) or [S]ection 251(g).").

9187 (¶ 78). The FCC also adopted a "mirroring rule," which required an incumbent seeking to cap its payments to competitors serving ISP customers at the new rates to accept payment for *all* voice traffic subject to Section 251(b)(5) under those same rates. See *id.* at 9193-9194 (¶ 89). The FCC concluded that the rate caps it adopted—set on the basis of contemporaneous voluntarily negotiated interconnection agreements—appeared to be fair, and it noted that competing LECs (CLECs) could recover cost shortfalls, if any, from their ISP customers rather than from their connecting carriers. *Id.* at 9188 (¶ 80), 9192 (¶ 87).

On further petitions for review, the D.C. Circuit rejected the FCC's conclusion that 47 U.S.C. 251(g) excluded ISP-bound traffic from Section 251(b)(5)'s reciprocal compensation obligations. *WorldCom, Inc.* v. *FCC*, 288 F.3d 429, 433-434 (2002), cert. denied, 538 U.S. 1012 (2003). The court of appeals held that Section 251(g) was simply "a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules," *id.* at 430, and therefore was inapplicable because "there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic," *id.* at 433. The court made "no further determinations," however. *Id.* at 434. Instead, recognizing a "non-trivial likelihood that the Commission has authority to elect" a bill-and-keep system, the court "remand[ed] the case to the Commission for further proceedings" without vacating the Commission's order. *Ibid.*

4. On November 5, 2008, the FCC issued the order currently under review, which "respond[ed] to the D.C.

Circuit's remand order." Pet. App. 23a.[4] The FCC concluded that Section 251(b)(5), which imposes reciprocal compensation obligations on LECs "for the transport and termination of telecommunications," is "broad enough to encompass ISP-bound traffic." *Ibid.* The FCC observed that the Act defines "telecommunications" broadly to include "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* at 24a-25a (quoting 47 U.S.C. 153(43)). In addition, the FCC found that ISP-bound traffic satisfies the agency's definition of "termination" as the "switching of traffic * * * at the terminating carrier's end office switch * * * and delivery of that traffic to the called party's premises." *Id.* at 29a (internal quotation marks omitted). The agency explained that traffic bound for the Internet via ISPs "is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" *Id.* at 29a-30a (citing *Bell Atl.*, 206 F.3d at 6).

The FCC's conclusion that ISP-bound traffic is within the scope of Section 251(b)(5), however, "d[id] not end [the Commission's] legal analysis." Pet. App. 32a. The Commission "reaffirm[ed] [its] findings concerning the interstate nature of ISP-bound traffic." *Id.* at 35a & n.69. It thus found that, "despite acknowledging that such traffic is [S]ection 251(b)(5) traffic," the agency retained the authority to regulate ISP-bound traffic (and to issue pricing rules) pursuant to its Section 201(b)

---

[4] The D.C. Circuit had issued a writ of mandamus directing the Commission to "explain the legal basis for its ISP bound compensation rules" by November 5, 2008. *In re Core Commc'ns*, 531 F.3d 849, 850, 862 (2008).

authority to establish "just and reasonable 'charges, practices, classifications and regulations'" for interstate services. *Id.* at 35a (quoting 47 U.S.C. 201(b)). In concluding that it retained its pricing authority over this interstate service, the agency relied in part on 47 U.S.C. 251(i), which provides that "[n]othing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." Pet. App. 33a; see *id.* at 35a-37a.

5. Petitioner Core Communications, Inc. (Core), a CLEC "engaged in delivering large quantities of incumbent LEC-originated Internet-bound dial-up traffic to Internet service providers," *Core Commc'ns, Inc.* v. *FCC*, 545 F.3d 1, 3 (2008) (internal citation omitted), and several state public utility regulatory organizations filed petitions for review in the D.C. Circuit. Petitioner Pennsylvania Public Utility Commission and other parties intervened. The court of appeals denied the petitions for review. Pet. App. 1a-14a.

Noting that "all parties agree[d] that the familiar principles of *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), apply to the FCC's construction of the Communications Act," Pet. App. 7a (parallel citation omitted), the court of appeals held that the Commission's interpretation of the relevant statutory provisions was reasonable, *id.* at 8a-9a. The court noted that Section 201 prohibits interstate carriers from charging rates that are not "just and reasonable" and authorizes the Commission to prescribe regulations to implement that prohibition. *Id.* at 7a. The court also observed that petitioners generally "accept[ed] the end-to-end analysis and its application to ISP-bound traffic." *Ibid.*; see *id.* at 9a ("Petitioners do not dispute that dial-up internet traffic extends from the ISP subscriber to

the internet, or that the communications, viewed in that light, are interstate.").

The court of appeals rejected petitioners' contention that the FCC's Section 201 authority was circumscribed by the 1996 Act's compensation provisions. In particular, the court rejected petitioners' contention that, under the interpretive canon that specific statutory provisions control over general ones, the statute's reciprocal compensation pricing regime should control over Section 201(b). Pet. App. 7a-9a. The court explained that "it is inaccurate to characterize [Section] 201 as a general grant of authority and [Sections] 251-252 as a specific one" because the "two statutes apply to intersecting sets." *Id.* at 8a (citation omitted). As the court noted, "[n]ot all inter-LEC connections" governed by Section 251 "are used to deliver interstate communications," and "not all interstate communications" (governed by Section 201) "involve an inter-LEC connection." *Ibid.* (citation omitted). "Given this overlap," the court concluded, "[Section] 251(i)'s specific saving of the Commission's authority under [Section] 201 against any negative implications from [Section] 251 renders the Commission's reading of the provisions at least reasonable." *Id.* at 8a-9a.

The court of appeals also rejected petitioners' contention that the FCC's interim rules were arbitrary and capricious because they "discriminate[d]" against ISP-bound traffic. Pet. App. 10a-11a. "[A]ssum[ing] *arguendo* that the concept of discrimination is relevant to regimes created under entirely different statutory provisions," the court explained that the Commission's desire to prevent regulatory arbitrage "provided a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet

traffic and the regime generally applicable to inter-LEC compensation under [Section] 251(b)(5)." *Id.* at 10a.[5]

ARGUMENT

The court of appeals correctly held that the Communications Act's longstanding grant of authority to the FCC over interstate communications provided a sound basis for the Commission's compensation rules for ISP-bound traffic. The court also correctly held that those rules were a reasonable response to the agency's valid concern about regulatory arbitrage. The court's decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the subject matter of this case (the FCC's compensation rules for dial-up Internet access) is of limited and rapidly diminishing practical significance. Further review is not warranted.

1. Petitioners contend (10-185 Pet. 19-26; 10-189 Pet. 9-18) that the Commission exceeded its authority when it issued pricing rules for ISP-bound traffic under Section 201 rather than allowing such traffic to be governed by reciprocal compensation rates prescribed by state commissions under Section 252. Petitioners identify no sound basis for concluding that the FCC's approach reflects an unreasonable interpretation of the Communications Act. See Pet. App. 7a.

a. The Communications Act authorizes the FCC to regulate the rates and terms of interstate common carrier services. 47 U.S.C. 201(b); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007) (*Global Crossing*). As the court of appeals explained, Section 201(b) "prohibits carriers

---

[5] The court of appeals declined to address "a number" of additional arguments because they appeared for the first time "outside of the petitioners' opening briefs." Pet. App. 12a.

engaged in the delivery of interstate communications from charging rates that are not 'just and reasonable,' and grants the FCC authority to prescribe regulations to implement the 1934 Act, which include all provisions of the 1996 Act." Pet. App. 7a. Moreover, the FCC has "consistently found that ISP-bound traffic is jurisdictionally interstate," *id.* at 35a n.69, and it properly reaffirmed that determination in the order under review, *id.* at 35a. The Commission thus had authority under Section 201 to issue the pricing rules at issue here.

Petitioner Pennsylvania PUC asserts (*e.g.*, 10-189 Pet. 17) that ISP-bound traffic is "local" because part of the communication—the call from the end-user customer to the ISP—"originate[s] and terminate[s] within a state." As the court of appeals explained, this argument "fails because it implicitly assumes inapplicability of the [FCC's] end-to-end [jurisdictional] analysis, which petitioners have not challenged." Pet. App. 9a. In the court of appeals, "[p]etitioners [did] not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate." *Ibid.*[6]

---

[6] Even if the Pennsylvania PUC had challenged the FCC's end-to-end jurisdictional analysis in the court of appeals, its claim would have failed. The existence of an intrastate segment within an end-to-end interstate service does not deprive the FCC of its Section 201(b) authority over the entire service. See, *e.g.*, *Verizon New England, Inc.* v. *Maine Pub. Utils. Comm'n*, 509 F.3d 1, 8 (1st Cir. 2007) (facilities "located in individual communities * * * have been used for decades to provide both interstate and intrastate service as part of a unified network" and as such are regulated by the FCC). Indeed, the whole point of end-to-end analysis is that, at least where the various components are inseparable, the jurisdictional nature of the overall communication is determined by the ultimate pathway, not by any discrete local component. See *ISP Remand Order*, 16 F.C.C.R. at 9175 (¶ 52). The Com-

b. Petitioner Core asserts that Sections 251 and 252, rather than Section 201, should control because the former provisions are "more specific" and therefore trump the "more general" Section 201. 10-185 Pet. 19-21. For two independent reasons, the specific-controls-the-general canon does not apply here.

First, as the court of appeals explained, "[n]ot all inter-LEC connections are used to deliver interstate communications," and "not all interstate communications involve an inter-LEC connection." Pet. App. 8a. Accordingly, neither provision comprises a "subset" of the other. *Ibid.* Instead, the two statutes "intersect, and dial-up internet traffic falls within that intersection." *Ibid.* "When . . . two statutes apply to intersecting sets . . . neither is more specific." *Ibid.* (quoting *Hemenway* v. *Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998)).[7]

Core contends that "[t]he specific-governs-general canon applies here, not solely because the 1996 Act covers a more specific category of communications, but also because it imposes a *more specific just-and-reasonable standard* for rates falling within" Sections 201 and 251-

---

mission has "consistently found that ISP-bound traffic is jurisdictionally interstate." Pet. App. 35a-36a n.69 (citing examples).

[7] The decisions Core cites (Pet. 21) are thus inapposite because they involved circumstances in which one statutory provision addressed a subset of a larger set covered by another provision. In *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002), for example, the "more specific" statute covered a subset of the cases covered by the "more general" provision. This Court explained that the "more specific" statute controlled, "but only within its self-described scope." *Id.* at 335-336. Similarly, the controlling ratemaking provision in *Ohio Power Co.* v. *FERC*, 954 F.2d 779 (D.C. Cir.), cert. denied, 506 U.S. 981 (1992), applied to a subset of the cases covered by FERC's more general rulemaking statute. See *id.* at 784-785.

252. 10-185 Pet. 21. That argument fails to take into account Congress's decision to authorize the Commission to promulgate specific rules implementing the "just and reasonable" standard in Section 201. Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," including the provision in Section 201 itself requiring that interstate rates be "just and reasonable." 47 U.S.C. 201(b). The Commission exercised that delegated authority to establish the rules at issue here, and they are no less specific than the rate-setting methodology prescribed by Sections 251 and 252.

Second, the interpretive canon that the "specific governs over the general" is simply a "rule[] of thumb which will sometimes help courts determine the meaning of legislation." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) (internal quotation marks omitted). The canon generally applies only in the absence of other statutory direction as to the proper means of reconciling potentially conflicting provisions. See *Gallenstein* v. *United States*, 975 F.2d 286, 290 (6th Cir. 1992) (canon does not apply "when the plain language of the two subsections can be reconciled without the need for the application of a general rule"). Here, the 1996 Act specifically provides that "[n]othing" in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. 251(i). That provision dispels any inference that might otherwise be drawn from the assertedly more specific character of Sections 251 and 252. As the court below explained, in light of "[Section] 251(i)'s specific saving of the Commission's authority under [Section] 201 against any negative implications from [Section] 251," the Commission's con-

struction of Section 201—which is entitled to *Chevron* deference—was "at least reasonable." Pet. App. 9a.

c. Core raises a number of challenges to the court of appeals' reliance on Section 251(i). 10-185 Pet. 22-26. Those arguments provide no basis for review by this Court, however, since they were neither presented to the court of appeals in Core's opening brief as petitioner nor passed on by the court below. See, *e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) (the Court generally does not review "questions not pressed or passed upon below"); see also *United States* v. *Galletti*, 541 U.S. 114, 120 n.2 (2004) (party "forfeited [an] argument by failing to raise it in the courts below").[8]

In any event, Core's contentions lack merit. Core first argues that Section 251(i) "does not permit the FCC to exercise [its Section 201] authority in a way that contravenes specific provisions of the 1996 Act," such as Section 252's requirements that intercarrier termination rates be determined by state commissions and based on carrier costs. 10-185 Pet. 23. But the Commission properly found (Pet. App. 35a), and the court of appeals agreed (*id.* at 9a), that the Commission's Section 201 authority over interstate rates remains intact even

---

[8] As the court of appeals observed, Core filed a brief as intervenor "raising a number of arguments that it did not raise as petitioner." Pet. App. 12a. The court properly refused to consider those arguments under its established rule that "[a]n intervening party may join issue only on a matter that has been brought before the court by another party." *Ibid.* (citing *Illinois Bell Tel. Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). The court likewise refused to consider arguments that first appeared in petitioners' reply briefs. *Id.* at 13a (citing *Board of Regents of the Univ. of Wash.* v. *EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)).

where Section 251 applies.[9] By contrast, Core's interpretation of Section 251(b)(5) as divesting the FCC of its historical authority over interstate traffic conflicts with the language of Section 251(i). See 47 U.S.C. 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201 of this title."). The Commission is "authorized" by Section 201 to declare any interstate charge unjust or unreasonable, *Global Crossing*, 550 U.S. at 49, and it has power, under the last sentence of Section 201(b), to promulgate the "rules and regulations" that may be necessary to implement the Act.[10]

---

[9] Core's reliance on *Morales* v. *TWA*, 504 U.S. 374, 385 (1992), is misplaced. That case involved the interplay between a general savings clause in 49 U.S.C. App. 1506 (1988), which provided that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute," and a specific preemption provision in the Airline Deregulation Act (ADA), which prohibited the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Morales*, 504 U.S. at 383-384. Unlike the ADA's preemption provision, 47 U.S.C. 252(d)(2)(A) does not purport to limit the Commission's authority—by its terms, the pricing standard in that section speaks only to what a "State commission" may do when arbitrating interconnection disputes. Because Core has identified no "specific substantive pre-emption provision" that conflicts with the savings clause in Section 251(i), *Morales*, 504 U.S. at 385, Core's attempt to analogize this case to *Morales* is unavailing. In addition, Section 251(i) is not a "general 'remedies' saving clause," *ibid.*, but rather a very specific one preserving the Commission's authority under a particular statutory provision: Section 201.

[10] Core contends that the Commission's authority to set rates for ISP-bound traffic is undermined by the fact that Section 251(i) refers only to Section 201 and not also to 47 U.S.C. 205, which authorizes the Commission to prescribe rates after a formal hearing or investigation. Pet. 24 n.7. That argument was neither raised before the agency nor properly asserted in the court of appeals, so it is not properly before this

Core also argues that Section 251(i) preserves the FCC's authority under Section 201 only from encroachment by Section 251, and not by Section 252. 10-185 Pet. 24-25. But Sections 251 and 252 cannot be separated in this way. Section 251(b)(5) establishes carriers' basic obligation to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. 251(b)(5), and Section 252(d)(2)(A) specifies the terms and conditions for reciprocal compensation "[f]or the purposes of compliance by an incumbent local exchange carrier *with [S]ection 251(b)(5)*," 47 U.S.C. 252(d)(2)(A) (emphasis added). By providing that the Commission's Section 201 authority is not limited by anything in Section 251, Congress necessarily protected that authority from displacement by the interdependent provisions of Section 252 that effectuate the obligations of Section 251.

d. Core asserts (10-185 Pet. 14) that the court of appeals' decision conflicts with this Court's decisions in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), and *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002) (*Verizon*), and with the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC*, 219 F.3d 744 (2000), aff'd in part and rev'd in part, 535 U.S. 467 (2002). The Pennsylvania PUC appears to make a simi-

---

Court. See 47 U.S.C. 405(a) (a petition for agency reconsideration is a "condition precedent to judicial review" of any "question[] of fact or law" upon which the Commission "has been afforded no opportunity to pass."); Pet. App. 12a-13a. In any event, Core misinterprets Section 205. That provision sets out available remedies when the Commission conducts a Section 204 adjudicatory investigation of individual tariffed charges filed under Section 203. See 47 U.S.C. 203, 204. Section 205 does not limit the Commission's independent (and generally applicable) rulemaking authority under Section 201.

lar claim. See 10-189 Pet. 9-10. Petitioners' reliance on those decisions is misplaced.

In *AT&T*, the Court considered challenges by States and local telephone companies to FCC rules implementing provisions of the 1996 Act that were designed to "end[] the longstanding regime of state-sanctioned monopolies" and facilitate competition in the provision of "local phone service." 525 U.S. at 371. Relying on 47 U.S.C. 152(b) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service"), some parties argued that the FCC lacked authority to establish a pricing methodology for States to follow in arbitrations when setting rates for *intrastate* telecommunications under the 1996 Act. *AT&T*, 525 U.S. at 374; see 47 U.S.C. 252. This Court disagreed, explaining that the FCC's "rulemaking authority [under Section 201(b)] would seem to extend to implementation of the local-competition provisions" of the 1996 Act. *AT&T*, 525 U.S. at 377-378. The Court noted that the FCC's Section 252(d) pricing rules did not "prevent[] the States from establishing rates," because having state commissions "apply" and "implement" the federal pricing methodology was "enough to constitute the establishment of rates" under Section 252(c)(2). *Id.* at 384. The Court in *Verizon* likewise addressed the 1996 Act's local competition pricing provisions. In that case, the Court explained that the 1996 Act establishes a "hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates." 535 U.S. at 489.

In neither *AT&T* nor *Verizon* did the Court address the scope of the Commission's authority (under Sections 201(b) and 251(i)) over rates for *interstate* communications. In *AT&T*, the Court assessed the constraints on the Commission's expanded authority to establish rules to implement the local competition pricing standards in Section 252(d). See 525 U.S. at 384-385. The *Verizon* decision simply summarized, for purposes of background discussion, that aspect of the 1996 Act discussed in the *AT&T* opinion. See 535 U.S. at 489. The Court had no occasion in either case to address whether Section 252(c)(2) prohibited rate-setting by the FCC in cases where the FCC is acting under its traditional—and independent—authority under Section 201 to regulate interstate telecommunications.

For substantially the same reason, there is no conflict between the decision below and the Eighth Circuit's decision in *Iowa Utilities Board*. In that decision, the Eighth Circuit, like this Court in *AT&T*, considered the FCC's authority to implement the local competition pricing standards of Section 252—in that case by means of "proxy prices" for reciprocal compensation (that is, "upper limits higher than which the rates set by the state commission shall not go," 219 F.3d at 756). Acknowledging that the Commission's Section 252 jurisdiction extends to establishing a "pricing methodology," *id.* at 757 (quoting *AT&T*, 525 U.S. at 385), the Eighth Circuit held that "the FCC does not have jurisdiction to set the actual prices for the state commissions to use" when acting under that provision. *Ibid.*

As the court below explained, the Eighth Circuit "reached its finding for purposes quite different from" the issue presented in this case, which involves FCC "ratesetting authority for a leg of an interstate commu-

nication." Pet. App. 10a. Because the Eighth Circuit "did not address the FCC's power to implement 'just and reasonable rates' under [Section] 201 or how that power was affected by [Sections] 251-252," the court below was not required to "take [a] position on the issue before the [Eighth] Circuit." *Ibid.*

2. Petitioners also contend that the FCC's order was arbitrary and capricious. These record-specific contentions lack merit and do not warrant this Court's review.

The Pennsylvania PUC contends (10-189 Pet. 20) that the Commission acted arbitrarily and capriciously in basing its interim rate caps on prices set in interconnection agreements, rather than on a determination of the cost of terminating ISP-bound traffic. But under Section 201, "[t]he FCC is not required to establish purely cost-based rates" as long as the FCC clearly explains the reasons for a departure from cost-based ratemaking. *Competitive Telecomms. Ass'n* v. *FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

The FCC met its burden of explanation here. It explained that it adopted a rate cap that declined to $0.0007 per minute of use in order to limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates." Pet. App. 41a (citation omitted); see *ISP Remand Order*, 16 F.C.C.R. at 9186-9187 (¶¶ 77-78). As the FCC noted, "[m]ost commenters urge[d] the Commission to maintain the[se] compensation rules governing ISP-bound traffic" because "a higher compensation rate would create new opportunities for arbitrage" and impose other economic burdens. Pet. App. 38a-39a.

Although Core asserts that the interim rates are "below-cost," 10-185 Pet. 26, 27, it fails to support that assertion with any evidence. In any event, the intercar-

rier compensation rates are not the only way for carriers to recover their costs. A carrier whose costs are not covered by the interim rates is free to recover those costs from its ISP customers. *ISP Remand Order*, 16 F.C.C.R. at 9156 (¶ 7). Indeed, the Commission's goal in adopting the interim rates was to encourage "decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion * * * that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic." *Ibid.*

Core contends that the interim rates are "discriminatory." 10-185 Pet. 27. As an initial matter, it is not clear "that the concept of discrimination is relevant to regimes created under entirely different statutory provisions." Pet. App. 10a. Moreover, the interim rates apply "to ISP-bound traffic only to the extent that an incumbent carrier offer[s] to exchange all traffic at the same rate." *Id.* at 42a-43a. The rules thus give competitive carriers that send traffic to incumbents the benefit of the same (lower) rate the incumbents pay for terminating ISP-bound traffic.

As the court of appeals correctly held, it was reasonable for the Commission to establish special rules for ISP-bound traffic. Pet. App. 10a. *Inter alia*, the court explained that the generally even balance between incoming and outgoing calls that typifies ordinary telephone service "is utterly absent from ISP-bound traffic," and that rates for such traffic were so distorted under the reciprocal compensation regime that the "CLECs were in effect paying ISPs to become their customers." *Id.* at 10a-11a. "To the extent that [incumbent LECs (ILECs)] simply passed the costs on to their customers generally," the court concluded, "they would

force their noninternet customers to subsidize those making ISP-bound calls, and the system would send inaccurate price signals to those using their facilities for internet access * * * and to those not doing so." *Id.* at 11a. "On the other hand," as those LECs sought to recover their reciprocal compensation liability from "their customers," the rates for such calls would be "'higher' than cost, correctly computed." *Ibid.* (quoting *ISP Remand Order*, 16 F.C.C.R. at 9192 (¶ 87)). The court therefore sustained the Commission's determination that "the continued application of the reciprocal compensation regime to ISP-bound traffic would 'undermine[] the operation of competitive markets.'" *Ibid.* (quoting *ISP Remand Order*, 16 F.C.C.R. at 9183 (¶ 71)).

3. Finally, this case presents a narrow question of diminishing practical significance.

The FCC order at issue here concerns only dial-up Internet access, which is a small and steadily shrinking percentage of the Internet access market due to the rapid growth of broadband Internet services. See *In re Core Comme'ns, Inc.*, 455 F.3d 267, 280 (D.C. Cir. 2006); Pet. App. 2a n.1. In 1998, "approximately 98 percent of households with Internet connections then used traditional telephone service to 'dial-up' their Internet access service provider." *In re Framework for Broadband Internet Service*, 25 F.C.C.R. 7866, 7871 (2010) (¶ 13). Today, fewer than 6 percent of Americans use dial-up Internet connectivity as their main form of home access. John B. Horrigan, *Broadband Adoption and Use in America* 3 (FCC, OBI Working Paper Series No. 1, 2010), http://hraunfoss.fcc.gov/edocs_pub/attachmatch/DOC-296442A1.pdf. Moreover, Congress recently directed the FCC to promote broadband deployment, and

the agency's efforts in response will likely further the already substantial decline in use of dial-up services."[11]

Core contends (Pet. 30) that the decision below will have significance beyond dial-up Internet because it "substantially alters the 1996 Act's allocation of federal state authority" by allowing "the FCC to set rates and thereby displace state authority whenever a communication also happens to fall within the FCC's claimed Section 201 authority." The decision below results in no such displacement. Although the 1996 Act gave the FCC new authority over areas traditionally governed by the States, the FCC did not exercise that new authority here. Rather, the FCC exercised its traditional jurisdiction over *interstate* communications under Section 201, a provision "left * * * in place" by the 1996 Act. *Global Crossing*, 550 U.S. at 50. The order on review thus preserves the longstanding allocation of authority between the FCC and the States.

Core speculates that the "theory" underlying the FCC's order has "wide ranging implications" for other contexts, including the Commission's authority to regulate "broadband Internet service," Pet. 31, and Voice over Internet Protocol (VoIP) communications, Pet. 32, and that it would relegate the States to "an increasingly

---

[11] The American Recovery and Reinvestment Act of 2009 directed the Commission to develop a National Broadband Plan that includes "an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(A), 123 Stat. 516 (47 U.S.C. 1305(k)(2)(A)). The Commission delivered the Plan to Congress on March 16, 2010, Press Release, *FCC Sends National Broadband Plan to Congress*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf, and has initiated proceedings to consider recommendations contained in the Plan. *In re Connect America Fund*, 25 F.C.C.R. 6657 (2010).

trivial category of cases," 10-185 Pet. 31; see also 10-189 Pet. 30-33. "[T]his Court reviews judgments, not opinions." *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984). The judgment below does not extend beyond the limited context of the Commission's authority under Section 201(b) to promulgate intercarrier rates for dial-up Internet traffic. The courts of appeals can address additional issues concerning the Commission's jurisdiction over interstate communications if and when such issues arise. See, *e.g.*, *Comcast Corp.* v. *FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (broadband Internet service); *Minnesota Pub. Util. Comm'n* v. *FCC*, 483 F.3d 570 (8th Cir. 2007) (VoIP).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

AUSTIN C. SCHLICK
General Counsel

RICHARD K. WELCH
Deputy Associate General Counsel

MAUREEN K. FLOOD
Counsel
Federal Communications Commission

OCTOBER 2010

172

Nos. 10-185 & 10-189

Supreme Court, U.S.
FILED
OCT 12 2010
CLERK

IN THE
Supreme Court of the United States

CORE COMMUNICATIONS, INC.
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AT&T, LEVEL 3, METROPCS, SPRINT NEXTEL, AND VERIZON

D. WAYNE WATTS
AT&T INC.
208 S. Akard Street
Suite 3702
Dallas, Texas 75202
(214) 757-3300

PAUL K. MANCINI
GARY L. PHILLIPS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3055
Counsel for AT&T Inc.

MICHAEL K. KELLOGG
Counsel of Record
SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@khhte.com)
Counsel for AT&T Inc. and Verizon

MICHAEL E. GLOVER
KAREN ZACHARIA
CHRISTOPHER M. MILLER
VERIZON
1320 N. Courthouse Road
Arlington, Virginia 22201
(703) 351-3071
Counsel for Verizon

October 12, 2010

(Additional Counsel Listed On Inside Cover)

RICHARD E. THAYER
LEVEL 3 COMMUNICATIONS
1025 Eldorado Boulevard
Broomfield, Colorado 80021
(720) 888-2620
Counsel for Level 3 Communications

ANTHONY M. ALESSI
SPRINT NEXTEL CORPORATION
2D783 VARESAO202
12502 Sunrise Valley Drive
Reston, Virginia 20196
Counsel for Sprint Nextel Corporation

CARL W. NORTHROP
STEPHEN B. KINNAIRD
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

MARK A. STACHIW
EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL & SECRETARY
METROPCS COMMUNICATIONS, INC.
2250 Lakeside Boulevard
Richardson, Texas 75082
(214) 570-4877
Counsel for MetroPCS Communications, Inc.

QUESTION PRESENTED

Whether the local competition provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), which amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, abrogated the Federal Communications Commission's authority to regulate one type of interstate telecommunications (dial-up Internet traffic) under § 201 of the Communications Act, even though the relevant provision of the 1996 Act expressly states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title," 47 U.S.C. § 251(i).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents AT&T Inc., Level 3 Communications, LLC, MetroPCS Communications, Inc., Sprint Nextel Corporation, and Verizon state the following:

AT&T Inc. AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

Level 3 Communications, LLC. Level 3 Communications, LLC is a wholly owned subsidiary of Level 3 Financing, Inc. Level 3 Financing, Inc. is a wholly owned subsidiary of Level 3 Communications, Inc. Level 3 Communications, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

MetroPCS Communications, Inc. MetroPCS Communications, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Sprint Nextel Corporation. As relevant to this case, Sprint Nextel Corporation provides wireless telecommunications services. Sprint Nextel Corporation has no parent company, and no publicly traded company owns 10 percent or more of its stock.

Verizon. The Verizon companies participating in this filing are Cellco Partnership d/b/a Verizon Wireless and the regulated, wholly owned subsidiaries of Verizon Communications Inc. Cellco Partnership, a general partnership formed under the law of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone

Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENTS ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT 3

REASONS FOR DENYING THE PETITIONS 14

I. THERE IS NO DIVISION OF AUTHORITY WARRANTING THIS COURT'S INTERVENTION 14

A. The Cases on Which Petitioners Rely Involve Implementation of the 1996 Act as to Intrastate Traffic and Network Components, Whereas This Case Concerns the Commission's Longstanding Authority To Regulate Interstate Traffic Under § 201 of the Communications Act 14

B. In Any Event, the Commission's Order Would Be a Permissible Implementation of the 1996 Act Because It Established a Pricing Methodology 18

II. THE D.C. CIRCUIT'S DECISION IS CORRECT 20

A. The Commission Reasonably Interpreted the Statute and Rationally Responded to the Unique Characteristics of ISP-Bound Traffic 21

B. Core's Challenges to the D.C. Circuit's Reasoning Lack Merit 23

C. The PaPUC's Challenges to the D.C. Circuit's Reasoning Are Equally Unpersuasive 27

III. THE QUESTION PRESENTED AFFECTS ONLY A SMALL AND DIMINISHING CLASS OF CASES 29

A. The Commission's Pricing Methodology Neither Increases Costs of Dial-Up nor Improperly Discriminates Against Particular Carriers 30

B. This Case Is Not a Vehicle in Which To Consider Regulation of Broadband or VoIP 34

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 1, 3, 14, 15, 16, 17, 18, 20, 35

Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) 6

Bilski v. Kappos, 130 S. Ct. 3218 (2010) 24

Core Communications, Inc., In re, 455 F.3d 267 (D.C. Cir. 2006) 8, 9, 10, 27, 33, 34

Duignan v. United States, 274 U.S. 195 (1927) ... 25, 26

Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45 (2007) 21

Hemenway v. Peabody Coal Co., 159 F.3d 255 (7th Cir. 1998) 11, 23, 24

Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) 1-2, 12, 14, 17, 18, 20

Louisiana Pub. Serv. Comm'n v. FCC, 479 U.S. 355 (1986) 23

Minnesota Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007) 34

National Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 24

Ohio Power Co. v. FERC, 954 F.2d 779 (D.C. Cir. 1992) 24

United States v. Baugham, 449 F.3d 167 (D.C. Cir. 2006) 25

United States v. Galletti, 541 U.S. 114 (2004) 25

Varity Corp. v. Howe, 516 U.S. 489 (1996) 24

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 1, 14, 16, 17, 18, 20

WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002) 8, 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 26

ADMINISTRATIVE DECISIONS

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 5

First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005), *petitions for review denied, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006) 35

STATUTES, REGULATIONS, AND RULES

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 3, 14, 15

47 U.S.C. § 151 3

47 U.S.C. § 152(a) 3

47 U.S.C. § 152(b) 3

47 U.S.C. § 201 ..... 2, 3, 7, 9, 10, 11, 14, 15, 16, 21, 22, 23, 25, 34

47 U.S.C. § 201(b) 1, 3, 15, 16, 21, 27

47 U.S.C. § 205 ..... 25, 26

47 U.S.C. § 251 ..... 2, 11, 15, 16, 21, 23, 25, 34

47 U.S.C. § 251(b) 4, 29

47 U.S.C. § 251(b)(5) 1, 2, 5, 6, 7, 9, 10, 12, 14, 15, 20, 22, 24, 26, 27, 29, 33

47 U.S.C. § 251(c)(3) 16, 17

47 U.S.C. § 251(g) 6, 8, 9

47 U.S.C. § 251(i) 1, 2, 3, 10, 11, 15, 16, 21, 25

47 U.S.C. § 252 ..... 2, 11, 12, 15, 16, 21, 23, 34

47 U.S.C. § 252(a)(1) 29

47 U.S.C. § 252(c)(2) 15, 16

47 U.S.C. § 252(d) 33

47 U.S.C. § 252(d)(1) 17

47 U.S.C. § 252(d)(2) 22, 23, 26, 27, 33

47 U.S.C. § 252(d)(2)(A) 22, 26

47 U.S.C. § 252(d)(2)(B)(i) 26, 33

47 U.S.C. § 252(d)(2)(B)(ii) 26

47 U.S.C. § 1302(a) 31

47 U.S.C. § 1302(d)(1) 31

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... 3, 5, 6, 14, 15, 16, 17, 18, 20, 21, 22, 35

Preamble, 110 Stat. 56 22

47 C.F.R. § 51.701(d) 9

Fed. R. App. P. 28(a)(9) 25

ADMINISTRATIVE MATERIALS

FCC, *Connecting America: The National Broadband Plan* (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf 31

OTHER MATERIALS

Brief for FCC, *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. filed Nov. 15, 2001) 28

INTRODUCTION

In the order petitioners challenge, the Federal Communications Commission ("the Commission" or "the FCC") placed on firm statutory footing the pricing methodology that it adopted in 2001 for dial-up traffic to Internet Service Providers ("ISPs"). The Commission reaffirmed both its longstanding conclusion that such traffic is jurisdictionally interstate and its authority under 47 U.S.C. § 201(b) to promulgate pricing rules to ensure that rates for this interstate traffic are just and reasonable. The Commission further held that Congress did not divest its § 201(b) authority over interstate traffic that also falls within 47 U.S.C. § 251(b)(5); on the contrary, in § 251(i), Congress expressly preserved that authority. Finally, the Commission concluded that the same policy concerns that motivated the Commission to adopt its ISP-bound-traffic pricing methodology — namely, the unique uneconomic arbitrage opportunities that one-way ISP-bound traffic presents — justified retaining those pricing rules. The D.C. Circuit denied petitions for review of the Commission's order, agreeing with the Commission's statutory analysis and its weighing of the policy considerations.

Further review of the D.C. Circuit's judgment is unwarranted for three reasons.

First, that decision does not conflict with any decision of this Court or another court of appeals. Petitioners are incorrect in claiming that the decision conflicts with the Court's decisions in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002), as well as the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S.

467 (2002). Those cases involved the Commission's authority to implement § 251 as to *intra*state telecommunications traffic or as to individual physical components of the local telephone network that are neither intrastate nor interstate. None addressed whether the Commission can regulate *inter*state telecommunications traffic under § 201, where § 251(b)(5) also applies to that interstate traffic. In fact, § 251(i) expressly preserves the Commission's authority to regulate directly under § 201.

Second, the D.C. Circuit's decision is correct. Petitioners' principal statutory argument is that 47 U.S.C. §§ 251-252 are more specific provisions that trump § 201. As the D.C. Circuit explained, however, § 201 and §§ 251-252 apply to overlapping sets of cases; therefore, neither is more specific than the other. The specific-controls-the-general canon is thus inapplicable here, especially considering Congress's express preservation in § 251(i) of the Commission's § 201 authority. In any event, even if §§ 251-252 did govern here, the Commission's pricing methodology is fully consistent with those provisions.

Third, the question presented lacks continuing importance. The Commission's pricing methodology responds to the unique characteristics of "dial-up" ISP-bound traffic. But dial-up is a means of Internet access that is "being rapidly replaced by various forms of higher-speed [*i.e.*, broadband] service." Pet. App. 2a n.1. Moreover, the Commission imposed this interim regime in response to uneconomic arbitrage, which threatened consumers, distorted the development of competitive markets by encouraging carriers to pay ISPs to be their customers, and even led to instances of outright fraud. In the wake of the Commission's 2001 order, parties have negotiated voluntary commercial arrangements consistent with

the Commission's pricing methodology that apply to the overwhelming majority of traffic local exchange carriers and wireless carriers exchange.

The petitions should be denied.

STATEMENT

1. Section 201 of the Communications Act of 1934 requires that the "charges" of "every common carrier engaged in interstate or foreign communication by wire" be "just and reasonable," and also authorizes the Commission to "prescribe such rules and regulations as may be necessary . . . to carry out the provisions of" the Act. 47 U.S.C. § 201(b). Initially, the Communications Act granted the Commission jurisdiction over interstate and foreign communications, *see id.* §§ 151-152(a), and generally preserved state jurisdiction over intrastate communications, *see id.* § 152(b).

In the Telecommunications Act of 1996 ("1996 Act"), Congress amended the Communications Act and extended federal authority to cover "the regulation of local [*i.e.*, *intra*state] telecommunications competition." *AT&T*, 525 U.S. at 378 n.6; *see also id.* at 378-80. In expanding federal authority over intrastate communications, Congress expressly left unchanged the Commission's pre-existing authority under § 201 over rates for interstate traffic. *See* 47 U.S.C. § 251(i) ("[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201").

To open local telephone markets to competition, the 1996 Act imposed a number of obligations on companies providing local telephone service (known as local exchange carriers or "LECs"). One of those duties is the "duty to establish reciprocal compensation arrangements for the transport and termination of

telecommunications." *Id.* § 251(b). As a general matter, "[r]eciprocal compensation arrangements require that when a customer of one carrier makes a local call to a customer of another carrier (which uses its facilities to connect, or 'terminate,' that call), the originating carrier must compensate the terminating carrier for the use of its facilities." Pet. App. 3a.

2. This case involves the Commission's response to a regulatory problem involving "dial-up" Internet access. "When a customer accesses the internet via 'dial-up,'" her call goes to her local exchange carrier, "which commonly hands the call off to another LEC, which in turn connects the customer to an internet service provider ('ISP')." Pet. App. 1a-2a. The ISP then provides the customer with access to the Internet. *See id.* at 2a. Dial-up is a means of Internet access that is "being rapidly replaced by various forms of [broadband] service." *Id.* at 2a n.1.

With respect to reciprocal compensation, dial-up ISP-bound traffic has an unusual feature: it flows only one way. *See id.* at 4a. Consequently, under a traditional reciprocal-compensation scheme, the caller's LEC would pay compensation to the ISP's LEC when the customer accesses the Internet through the ISP. But, because ISPs do not make any (or nearly any) calls, the ISP's LEC, to the extent it had ISP customers, would pay little or nothing to other LECs.

In addressing the consequences of these unique features, the Commission explained that, although "Congress had intended to facilitate" the "entry of LECs . . . offering viable local telephone competition," "some LECs saw the opportunity to sign up ISPs as customers" in order to collect "large one-way flows of cash." Pet. App. 904a. The Commission found further that incumbent LECs were being billed approx-

imately $1.8 billion annually in reciprocal compensation (at rates set by state commissions) by LECs with ISP customers. *See id.* at 889a. The Commission explained that the availability of these payments "led to classic regulatory arbitrage that had two troubling effects": first, "it created incentives for inefficient entry of LECs intent on serving ISPs exclusively," and, second, "the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services." *Id.* at 904a.

3.a. In 1999, the Commission issued an order in which it took its "first step" (Pet. App. 5a) to address ISP-bound traffic. *See id.* at 1032a-1074a. The Commission explained that it "traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points." *Id.* at 1043a. Employing that "end-to-end" jurisdictional analysis, the Commission determined that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." *Id.* at 1047a-1049a. It accordingly concluded that, because "a substantial portion of Internet traffic involves accessing interstate or foreign websites," *id.* at 1054a, "ISP-bound traffic is non-local interstate traffic," *id.* at 1060a n.87.

The Commission previously had interpreted § 251(b)(5), the 1996 Act's reciprocal-compensation provision, to apply only to local telecommunications traffic.[1] Adhering to that construction, the Commission held that, because ISP-bound traffic is "non-local

---

[1] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (subsequent history omitted).

interstate traffic," "the reciprocal compensation requirements of section 251(b)(5) . . . do not govern intercarrier compensation for this traffic." *Id.*

On review, the D.C. Circuit vacated the Commission's order and remanded. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). The D.C. Circuit recognized that there was "no dispute that the Commission has historically been justified in relying on" its end-to-end analysis "when determining whether a particular communication is jurisdictionally interstate." *Id.* at 5. It held, however, that the Commission "ha[d] not provided a satisfactory explanation" for its conclusion that its jurisdictional analysis controlled whether § 251(b)(5) applies to ISP-bound traffic. *Id.* at 8.

b. In 2001, the Commission issued its order on remand from *Bell Atlantic*. *See* Pet. App. 882a-993a. The Commission began its analysis by reaffirming its determination that, on an end-to-end basis, ISP-bound traffic is jurisdictionally interstate. *See id.* at 928a-939a.

Next, responding to the D.C. Circuit's decision, the Commission revisited its interpretation of § 251(b)(5). *See id.* at 912a-913a. It stated that § 251(b)(5) establishes a general rule requiring "reciprocal compensation for transport and termination of *all* telecommunications traffic" a LEC "exchanges . . . with another carrier." *Id.* at 911a. The Commission concluded, however, that another provision of the 1996 Act, 47 U.S.C. § 251(g) — which provides for continued enforcement of certain requirements existing at the 1996 Act's enactment, including those governing "receipt of compensation" for access traffic — excludes from § 251(b)(5) ISP-bound traffic, among other traffic. *See* Pet. App. 912a-923a.

The Commission next decided to exercise its § 201 authority over jurisdictionally interstate traffic and to promulgate an interim intercarrier-compensation regime for ISP-bound traffic. The Commission found "convincing evidence in the record" that state-commission decisions requiring payment of reciprocal compensation for ISP-bound traffic had "led to classic regulatory arbitrage" and "distort[ed] the development of competitive markets." *Id.* at 887a, 904a, 909a. Reciprocal-compensation payments of nearly $2 billion annually to LECs serving ISPs had encouraged some LECs to provide free service to ISPs and even to pay ISPs to be their "customers." *See id.* at 887a, 889a-890a, 904a, 943a-944a, 948a-950a.

To "limit the regulatory arbitrage opportunity presented by ISP-bound traffic," *id.* at 887a, the Commission adopted a four-part, market-based pricing methodology. First, the Commission set a market-based cap on the payments that a carrier can receive from another carrier for ISP-bound traffic, based on "recently negotiated" contracts. *Id.* at 959a. Second, to the extent a carrier with ISP customers does not recover all of its costs of handling ISP-bound traffic from the originating carrier, the Commission's methodology directs that carrier to look to its own customers for cost recovery. *See id.* at 953a; *see also id.* at 961a-963a. Third, the Commission adopted a mirroring rule; under that rule, for a LEC to obtain the benefits of the pricing methodology as to ISP-bound traffic, it must offer to extend the rate cap to the voice traffic subject to § 251(b)(5) that it exchanges with other LECs (and wireless carriers). *See id.* at 964a-966a. Fourth, the Commission established a "growth cap" and a "new markets rule," both of which limited the number of minutes of ISP-bound

traffic for which a LEC could obtain payment from another carrier. *See id.* at 951a-952a, 955a-956a, 960a-961a.

On review, the D.C. Circuit rejected the Commission's reliance on § 251(g) and remanded the matter to the Commission. *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-34 (D.C. Cir. 2002). Apart from deciding that § 251(g) did "not provide a basis for the Commission's action," the D.C. Circuit did not resolve any other issue, including "petitioners' claims that the interim pricing limits . . . are inadequately reasoned." *Id.* at 434. Because there was a "non-trivial likelihood" that the Commission had authority to adopt its pricing methodology, the court "d[id] not vacate the order." *Id.*

c. In 2004, the Commission modified its ISP pricing methodology by granting (in part) a petition filed by Core Communications, Inc. ("Core") (petitioner in No. 10-185). *See* Pet. App. 849a-869a. The Commission eliminated the "growth cap" and the "new markets rule," both of which had limited the number of minutes of ISP-bound traffic for which a carrier could seek payment. *See id.* at 853a-855a, 862a-863a, 865a-866a, 867a-868a. The Commission, however, retained the rate caps and the mirroring rule, finding that those rules "remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Id.* at 862a.

On review, the D.C. Circuit upheld the Commission's order and rejected Core's challenge to the Commission's decision to retain the rate caps and the mirroring rule. *See In re Core Communications, Inc.*, 455 F.3d 267, 277-79 (D.C. Cir. 2006). The court recognized that Core "challenge[d] the [FCC's 2001

order] itself" and rejected Core's claims, approving as reasonable the Commission's "economic analysis" of the problems ISP-bound traffic raises. *Id.*

d. On November 5, 2008, the Commission issued its order responding to the D.C. Circuit's *WorldCom* decision, which led to the D.C. Circuit decision that is the subject of the petitions here. *See* Pet. App. 15a-59a.[2] Modifying its statutory analysis to account for the *WorldCom* court's rejection of its reliance on § 251(g), the Commission placed its pricing methodology for ISP-bound traffic on a firm statutory footing.

The Commission first held that § 251(b)(5) is "broad enough to encompass ISP-bound traffic." *Id.* at 23a-24a. It explained that ISP-bound traffic is subject to § 251(b)(5) because such traffic satisfies the Commission's rule defining "termination" for this limited and specific purpose as the "switching of traffic . . . at the terminating carrier's end office switch . . . and delivery of that traffic to the called party's premises." *Id.* at 29a (internal quotation marks omitted; second ellipsis in original); *see* 47 C.F.R. § 51.701(d).

The Commission also "re-affirm[ed]" its "consistent[]" conclusion that ISP-bound traffic is "jurisdictionally interstate" and therefore subject to the Commission's authority over interstate traffic under § 201. Pet. App. 32a, 35a & n.69. The Commission explained that this conclusion was "reinforced by"

---

[2] In July 2008, the D.C. Circuit granted Core's petition for a writ of mandamus and directed the Commission to issue an order responding to *WorldCom* by November 5, 2008. *See* Pet. App. 816a. The court made clear that, in granting mandamus, it was not directing the Commission "to promulgate any particular rule or policy." *Id.* at 811a.

§ 251(i), *id.* at 35a-36a, which directs that "[n]othing in [§ 251] shall be construed to limit or otherwise affect the Commission's authority" under § 201, 47 U.S.C. § 251(i). The Commission accordingly concluded that the applicability of § 251(b)(5) to ISP-bound traffic did not eliminate the Commission's independent § 201 authority to establish rules for that traffic. *See* Pet. App. 35a-37a.

The Commission also retained the market-based pricing methodology it adopted in 2001, again finding that the rules it promulgated could and should be maintained under its § 201 authority. *See id.* at 44a. The Commission reiterated the necessity of addressing the "significant arbitrage opportunities" created by the unique "one-way nature of ISP-bound traffic." *Id.* at 40a. It explained that the "policy justifications" it had provided in 2001 for adopting the rules had "not been questioned by any court" and, in fact, had been sustained by the D.C. Circuit in *Core*, 455 F.3d at 279. Pet. App. 44a. The Commission stated that it would keep those provisions in place until it "adopt[s] more comprehensive intercarrier compensation reform." *Id.* at 45a.

4. The D.C. Circuit denied petitions for review of the Commission's November 2008 order filed by Core, the New York Public Service Commission ("the NYPSC"), and the National Association of Regulatory Utility Commissioners ("NARUC"). *See* Pet. App. 1a-14a.[3]

The D.C. Circuit agreed with the Commission's interpretation of § 201 and § 251(i) as granting and

---

[3] The Pennsylvania Public Utility Commission ("the PaPUC") (petitioner in No. 10-189) participated in the proceedings before the D.C. Circuit as an intervenor.

preserving the Commission authority to regulate ISP-bound traffic. *See id.* at 7a. It noted that the savings provision in § 251(i) "fortifie[d] the Commission's position" and that the petitioners generally "accept[ed] the [Commission's] end-to-end [jurisdictional] analysis and its application to ISP-bound calls." *Id.* (citing *id.* at 35a-37a & n.69); *see id.* at 1043a-1046a, 1052a-1054a.

The D.C. Circuit rejected the petitioners' contention that the provisions respecting reciprocal compensation in §§ 251-252 "must trump" the Commission's authority under § 201 on the theory that, "where both a specific and a general provision cover the same subject, the specific provision controls." *Id.* at 7a-8a (internal quotation marks omitted). The court explained that "it is inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one" because "[n]either regime is a subset of the other." *Id.* at 8a. Rather, the "'two statutes apply to intersecting sets,'" the court reasoned, because "[n]ot all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." *Id.* (quoting *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998) (Easterbrook, J.)). Therefore, because "'neither [statutory provision] is more specific,'" the specific-controls-the-general canon is inapplicable. *Id.* (quoting *Hemenway*, 159 F.3d at 264). The court further explained that, because dial-up traffic falls within the intersection of § 201 and §§ 251-252, "§ 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251 renders the Commission's reading of the provisions at least reasonable." *Id.* at 8a-9a.

Turning to the petitioners' contention that, "because the call to the ISP terminates locally" for purposes of § 251(b)(5), "the FCC's authority over interstate communications is inapplicable," the D.C. Circuit held that the argument "fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged." *Id.* at 9a. The court noted that "the FCC has consistently applied [the end-to-end] analysis to determine whether communications are interstate for purposes of § 201" and that the petitioners did "not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate." *Id.* The court explained that "it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)," under the FCC's specific definition for this provision. *Id.* (alteration in original).

The D.C. Circuit also observed that the petitioners "appear[ed] indirectly to invoke" an Eighth Circuit decision stating that the Commission lacks authority "to set actual prices" when implementing § 252. *Id.* at 9a-10a (referring to *Iowa Utilities Board*). The D.C. Circuit took "no position on the issue before the 8th Circuit," explaining that the Eighth Circuit case was "quite different" in that it did not involve "FCC ratesetting authority for a leg of an interstate communication" and "did not address the FCC's power to implement 'just and reasonable' rates under § 201 or how that power was affected by §§ 251-252." *Id.* at 10a.

The D.C. Circuit also rejected the petitioners' argument that the Commission acted arbitrarily in

establishing its pricing methodology for ISP-bound traffic. It explained that the Commission "provided a solid grounding" for its pricing methodology in its findings that the normal balance between incoming and outgoing calls "is utterly absent from ISP-bound traffic" and that "the rates for such traffic were so distorted that CLECs were in effect paying ISPs to become their customers." *Id.* at 10a-11a. The court agreed with the Commission that "the continued application of the reciprocal compensation regime to ISP-bound traffic would 'undermine[] the operation of competitive markets.'" *Id.* at 11a (quoting *id.* at 944a) (alteration in original).

Finally, the D.C. Circuit "note[d] the presence of a number of arguments introduced outside of the petitioners' opening briefs." *Id.* at 12a. It explained that, under settled circuit precedent, those arguments were not properly presented. *See id.* at 12a-13a. The court accordingly "d[id] not consider" them. *Id.* at 13a.

Core and the PaPUC sought rehearing, which the D.C. Circuit denied. *See id.* at 1085a-1088a.

REASONS FOR DENYING THE PETITIONS

I. THERE IS NO DIVISION OF AUTHORITY WARRANTING THIS COURT'S INTERVENTION

Core asserts (at 14-19) that the D.C. Circuit's decision conflicts with this Court's decisions in *AT&T* and *Verizon*, as well as the Eighth Circuit's decision in *Iowa Utilities Board*. It claims (at 15) that those cases stand for the proposition that, as to matters to which a provision of the 1996 Act applies, the FCC can establish rate methodologies but cannot "set actual rates" — the latter task (it asserts) is left to state commissions. *See also* PaPUC Pet. 9-11.

Petitioners' claim of conflict fails because the cases on which they rely do not address the question presented. Even aside from that fact, the Commission's order is fully consistent with the proposition that petitioners attribute to those cases — namely, that the FCC cannot set rates for traffic to which § 251(b)(5) applies — because the FCC established a pricing methodology; it did not set rates.

A. The Cases on Which Petitioners Rely Involve Implementation of the 1996 Act as to Intrastate Traffic and Network Components, Whereas This Case Concerns the Commission's Longstanding Authority To Regulate Interstate Traffic Under § 201 of the Communications Act

Petitioners incorrectly invoke the decisions they cite. Each involved the Commission's authority *to implement the 1996 Act* as to *intra*state telecommunications traffic or as to individual physical components of the local telephone network that are neither interstate nor intrastate. None addressed the issue in this case, which is whether the Commission can

regulate *inter*state telecommunications traffic *under § 201*, where § 251(b)(5) also applies to the traffic in question. Further, none of those cases considered any of the statutory arguments pressed in the petitions — that is, none considered whether §§ 251-252 are "more specific" statutory provisions that control § 201, and none addressed the proper scope and meaning of the savings clause in § 251(i).

1. In *AT&T*, the court of appeals had held that the Commission lacked authority to promulgate a pricing methodology for state commissions to follow in setting rates under the 1996 Act for intrastate traffic and physical network components. That court had reasoned that "the general rulemaking authority conferred upon the Commission by the Communications Act of 1934 extended only to interstate matters, and that the Commission therefore needed specific congressional authorization before implementing provisions of the 1996 Act addressing intrastate telecommunications." *AT&T*, 525 U.S. at 374. This Court disagreed, concluding that the Commission's general "rulemaking authority" under § 201(b) extended "to implementation of the local-competition provisions" of the 1996 Act. *Id.* at 377-78.

In the discussion on which Core relies (at 15-16), the *AT&T* Court rejected the contention that the Commission's pricing rule contravened language in the 1996 Act empowering state commissions to "establish any rates." 47 U.S.C. § 252(c)(2). The Court explained that having state commissions "apply" and "implement" the Commission's pricing methodology was "enough to constitute the establishment of rates" for purposes of § 252(c)(2). *AT&T*, 525 U.S. at 384. The Court did not address — because it was not presented — whether § 252(c)(2) prohibited rate-setting

by the FCC in cases where the FCC is not implementing the 1996 Act but instead is acting under § 201 to regulate interstate telecommunications directly. Instead, the Court "assume[d]" that § 252(c)(2) required state-commission ratemaking as to intrastate telecommunications and physical network elements, and held that the Commission's promulgation of a pricing methodology did not usurp that state-commission role. *Id.* at 385 n.10.

The discussion in *AT&T* regarding the Commission's authority to promulgate rules to implement §§ 251 and 252 as to intrastate telecommunications is inapplicable where, as here, the Commission is not implementing the 1996 Act but instead is exercising the independent authority § 201(b) grants it to regulate jurisdictionally interstate traffic. Indeed, *AT&T* construed only the grant of rulemaking authority in the last sentence of § 201(b); it did not address the Commission's authority to regulate rates found in the first sentence of that subsection. Moreover, § 251(i) resolves any doubt in that regard by specifying that the regulatory regime the 1996 Act creates to promote local competition does not "limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

2. This Court's decision in *Verizon* is even further afield. There, the parties took as a given the Court's conclusion in *AT&T* that the Commission possesses rulemaking authority to implement the pricing provisions of the 1996 Act, and the background language Core cites (at 16) simply restates that conclusion. The controversy in *Verizon* concerned whether the pricing rule the Commission promulgated to implement § 251(c)(3) (requiring access to the physical components of the local network) comported with

§ 252(d)(1) and the 1996 Act as a whole. *See* 535 U.S. at 495 ("the incumbent carriers' primary challenge [in the appeal] went to the method that the Commission chose" to implement the 1996 Act); *id.* at 497-501 (addressing incumbents' contention that Commission's implementation of the 1996 Act was inconsistent with § 252(d)(1)); *see also id.* at 523 (reversing "Eighth Circuit's judgment insofar as it invalidated [the Commission's] method for setting rates *under* the [1996] Act") (emphasis added). Because the Commission did not purport to implement the 1996 Act in this proceeding, which also implicates neither § 251(c)(3) nor § 252(d)(1), the discussion in *Verizon* is beside the point.

3. The Eighth Circuit's decision in *Iowa Utilities Board*, issued on remand from this Court's decision in *AT&T*, also is inapt. The Eighth Circuit's analysis, no different from the Court's in *AT&T*, was limited to the question of the Commission's actions to implement the 1996 Act as to intrastate telecommunications traffic and components of the local network. Thus, as the D.C. Circuit explained, the "issue before the 8th Circuit" was "quite different from" the issue presented here, involving Commission regulatory "authority for a leg of an interstate communication," so the Eighth Circuit "did not address the FCC's power to implement 'just and reasonable' rates under § 201 or how that power was affected by §§ 251-252." Pet. App. 10a. For those reasons, the D.C. Circuit correctly recognized that the Eighth Circuit's decision has no bearing on this case and declined to take a "position on the issue before the 8th Circuit." *Id.*

In all events, *Iowa Utilities Board* does not assist petitioners because the court there rested its rejection of certain FCC-established proxy prices on the

doctrine of judicial estoppel. The parties contesting the proxy prices "argue[d] the proxy prices should be vacated for three reasons" — the Commission "expressly disavowed the proxy prices before" this Court in *AT&T*; the proxy prices "are based on [an] unlawful [pricing] method and employ [an] impermissible definition of 'avoided retail costs'"; and the proxy prices "were developed using unreliable cost models." 219 F.3d at 756.

The court "agree[d] with the petitioners" that the Commission was "estopped from" defending the proxy prices. *Id.* The language on which Core relies (at 18) appears as part of the Eighth Circuit's discussion of why it was "not persuaded" by the FCC's effort to explain away its "position before the Supreme Court" and thereby to avoid judicial estoppel. 219 F.3d at 756. The concluding sentence of the paragraph from which Core quotes (at 18) makes clear that the Eighth Circuit was still expounding its judicial-estoppel holding: "we now *agree with the FCC* that its role" in implementing the 1996 Act "is to resolve 'general methodological issues.'" 219 F.3d at 757 (quoting the Commission's brief in *AT&T*) (emphasis added).

B. In Any Event, the Commission's Order Would Be a Permissible Implementation of the 1996 Act Because It Established a Pricing Methodology

There is, moreover, no conflict between the D.C. Circuit's decision in this case and *AT&T*, *Verizon*, and *Iowa Utilities Board* for an additional reason: the premise of Core's claim of conflict — that the Commission here "set rates" for ISP-bound traffic (Core Pet. 11) — is incorrect. The Commission did not prescribe a fixed rate for ISP-bound traffic;

instead, the Commission established a market-based pricing methodology for such traffic, which includes a rate cap among other features.

The Commission's market-based pricing methodology currently has three components. *See supra* pp. 7-8. First, the Commission established a market-based cap on the payments that a carrier can receive from another carrier for ISP-bound traffic, based on "recently negotiated" contracts containing rates for ISP-bound traffic. Pet. App. 959a. But the Commission did not mandate that all carriers charge a specific rate. Carriers remain free to negotiate rates irrespective of the cap, and the record showed that many carriers had negotiated rates significantly below the cap. *See* FCC C.A. Br. 49 (filed June 19, 2009) (noting that the record "contained substantial evidence that most calls to ISPs were now being terminated at rates well *under* the $.0007 cap pursuant to voluntary agreements").

Second, the Commission's methodology provides that any carrier that does not recover all of its costs of handling ISP-bound traffic from the originating carrier should seek to recover the remainder of its costs from its ISP customers. *See* Pet. App. 953a, 961a-963a. Moreover, competitive LECs' recovery from their customers "is generally not regulated," *id.* at 953a n.151, and the Commission did not limit the ability of competitive LECs to recover costs from their ISP customers, even though it has limited recovery from customers in other areas of the marketplace. Thus, a competitive LEC with ISP customers remains free to recover any remaining costs from its customers at whatever rates the market will bear.

Third, the Commission adopted a mirroring rule. Under that rule, for a LEC to obtain the benefits of

the pricing methodology, it must offer to extend the rate cap to voice traffic subject to § 251(b)(5) that it exchanges with other LECs (and wireless carriers). *See id.* at 964a-966a. If a LEC elects not to make that offer, the rate cap does not apply to ISP-bound traffic. *See id.* at 965a. Thus, the mirroring rule likewise is not a rate prescription, but a means of structuring negotiations so that carriers "will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic." *Id.* at 966a.

Because the Commission's orders established a pricing methodology for ISP-bound traffic, rather than "set[ting] actual rates" (Core Pet. 15), they are fully consistent with the cases on which petitioners rely. Each of those cases recognized the Commission's authority to promulgate pricing methodologies that are binding on the states, even where the Commission is implementing the 1996 Act as to intrastate traffic (which, as explained above, is not the case here). *See AT&T*, 525 U.S. at 385; *Verizon*, 535 U.S. at 489; *Iowa Utils. Bd.*, 219 F.3d at 757.

II. THE D.C. CIRCUIT'S DECISION IS CORRECT

The D.C. Circuit correctly held that the Commission's order sets forth a reasonable interpretation of the pertinent statutory provisions and a rational explanation for the Commission's pricing methodology for ISP-bound traffic, which responds to that traffic's unique characteristics and the opportunities for regulatory arbitrage it creates. Petitioners' criticisms of the D.C. Circuit's reasoning lack merit.

A. The Commission Reasonably Interpreted the Statute and Rationally Responded to the Unique Characteristics of ISP-Bound Traffic

As the D.C. Circuit concluded, § 201 provides authority for the Commission's pricing methodology for ISP-bound traffic. That section authorizes the Commission "to regulate charges for traffic and services subject to federal jurisdiction." Pet. App. 35a; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) (noting that the Commission has "long implemented § 201(b)" and its prohibition of unjust and unreasonable rates and practices "through the issuance of rules and regulations"). Under the Commission's end-to-end jurisdictional analysis, which petitioners "have not challenged," Pet. App. 9a, ISP-bound traffic is "subject to federal jurisdiction" and, accordingly, "falls under the Commission's section 201 authority," *id.* at 35a. Because § 201 grants the FCC power to regulate interstate traffic and because ISP-bound traffic is jurisdictionally interstate, § 201 provides authority for the Commission to establish a pricing methodology (or an actual price) for ISP-bound traffic. *See id.* at 7a.

Nothing in § 251 or § 252 strips the Commission of its authority to regulate ISP-bound traffic under § 201. On the contrary, in § 251(i), Congress expressly preserved the Commission's pre-existing authority over interstate telecommunications. Thus, as the D.C. Circuit explained, the Commission's construction of the relationship between its authority to regulate jurisdictionally interstate traffic under § 201(b) and the 1996 Act's provisions for promoting local competition was "at least reasonable" — and there-

fore entitled to deference — especially given "§ 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251." *Id.* at 8a-9a.

Nor did Congress, in § 252(d)(2), establish a comprehensive pricing regime for § 251(b)(5) traffic that could displace the Commission's longstanding authority under § 201. The pricing standard in § 252(d)(2)(A) applies only "[f]or the purposes of compliance by an *incumbent* local exchange carrier," 47 U.S.C. § 252(d)(2)(A) (emphasis added), whereas § 251(b)(5) imposes duties on *all* local exchange carriers. Even with respect to incumbents, the FCC has noted that "[s]ection 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network." Pet. App. 29a. Moreover, § 252(d)(2)(A) addresses only what a "State commission" may do and does not limit the FCC's authority.

The Commission's resolution of the problems ISP-bound traffic posed also was eminently rational. The Commission faced a massive economic disruption resulting from the unique characteristics of ISP-bound traffic. *See id.* at 4a. The statutory construction urged by certain carriers (such as Core) would have led to continued irrational results, including carriers paying ISPs to be their customers. *See id.* at 4a, 11a. That would have converted the 1996 Act — a statute intended to "promote competition," 1996 Act, Preamble, 110 Stat. 56 — into one that undermined investment and harmed competition. Those irrational results weighed heavily against the reading that Core and others urged. (Notably, other carriers with ISP customers supported the Commission's position before the D.C. Circuit and oppose certiorari here.)

B. Core's Challenges to the D.C. Circuit's Reasoning Lack Merit

Core contends (at 19-26) that the D.C. Circuit erred in concluding that § 201 authorized the Commission to establish its pricing methodology for ISP-bound traffic, notwithstanding the restrictions in §§ 251-252. To the extent preserved for review, Core's arguments are incorrect; in any event, Core's premise — that the Commission's pricing methodology is inconsistent with §§ 251-252 — is erroneous.

1. Core asserts (at 19-21) that §§ 251-252 are "more specific" statutory provisions that trump the assertedly "more general" provision in § 201. But, as the D.C. Circuit explained, "it is inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one," because the "'two statutes apply to intersecting sets.'" Pet. App. 8a (quoting *Hemenway*, 159 F.3d at 264). Indeed, Core does not dispute that "[n]ot all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." *Id.* Consequently, "'neither [statutory provision] is more specific,'" and the specific-controls-the-general canon is inapplicable. *Id.* (quoting *Hemenway*, 159 F.3d at 264); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 479 U.S. 355, 377 n.5 (1986) (rejecting application of canon where "the sections are not general or specific with respect to each other").

Core asserts (at 20), however, that §§ 251-252 control nonetheless, because they contain the more specific "standard for determining just and reasonable rates." Even aside from the fact that, as explained above, Core is wrong in claiming that § 252(d)(2) establishes a comprehensive pricing stan-

dard for § 251(b)(5), accepting Core's argument would eviscerate the specific-controls-the-general canon. If the statute with the more detailed substantive provisions always governed, then a statute covering an entire set of cases (a "more general" statute) would control over a statute that covered a subset of those cases (a "more specific" one), so long as the broader statute had more specific substantive provisions. That would allow the statute with broader application to render the more specific statute meaningless, in violation of the venerable "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010); *cf. Hemenway*, 159 F.3d at 264 ("When one statute applies to a subset of another, the canon about general and specific statutes does not really do anything; all the useful work is done by the presumption that every statute serves a function.").[4]

Further, the specific-controls-the-general canon applies only in the absence of other statutory evidence of how to reconcile a general and specific provision. *See Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (rejecting application of "the specific governs

---

[4] Tellingly, neither of the cases Core cites (at 20-21) supports its understanding of the canon. In *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002), the "more specific" statute covered a subset of the cases reached by the "more general" provision. Thus, the Court — focusing on the scope of the statutes and not the specificity of their substantive provisions — explained that the "more specific" statute controlled, "but only within its self-described scope." *Id.* at 335-36. Similarly, the ratemaking provision that was held to control in *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992), applied to a subset of the cases covered by the Federal Energy Regulatory Commission's more general ratemaking statute.

over the general" canon and noting that "[c]anons of construction . . . are simply rules of thumb which will sometimes help courts determine the meaning of legislation") (internal quotation marks omitted). Here, in § 251(i), Congress expressly instructed courts how to reconcile the relationship between § 201 and § 251. There accordingly is no role for an interpretive rule of thumb.

2. Core presents (at 22-26) multiple criticisms of the D.C. Circuit's reliance on § 251(i). None of those arguments, however, was properly pressed or passed on below. Core mentioned § 251(i) only in passing in the background section of its petitioner's brief. *See United States v. Baugham*, 449 F.3d 167, 178 n.3 (D.C. Cir. 2006) (argument mentioned only in background section does not satisfy the requirements of Federal Rule of Appellate Procedure 28(a)(9) and is waived); Pet. App. 12a-13a (declining to consider arguments not presented in petitioners' opening briefs).[5] Accordingly, those arguments provide no basis on which to grant certiorari. *See, e.g., Duignan v. United States*, 274 U.S. 195, 200 (1927) (Court generally does not review "questions not pressed or passed upon below"); *see also United States v. Gallet-ti*, 541 U.S. 114, 120 n.2 (2004) (party "forfeited [an] argument by failing to raise it in the courts below").[6]

---

[5] For their part, in the D.C. Circuit, the NYPSC and NARUC asserted, in a single sentence and with no explanation, that § 251(i) was meant to preserve only the Commission's pre-1996 Act § 201 authority over interconnection. Even if that assertion (which neither petitioner presses in this Court) were sufficient to preserve the argument, it is incorrect; § 251(i)'s text is broad and contains no limitation to authority over interconnection.

[6] Core admits (at 24 n.7) that one of its arguments regarding § 251(i) — its reliance on 47 U.S.C. § 205 — was not considered

3. Finally, Core's claim (at 23) that the Commission's rate methodology violates § 252(d)(2) is incorrect even on its own terms. That provision requires only that reciprocal-compensation arrangements provide for "the mutual and reciprocal recovery" of a "reasonable approximation" of the costs involved in carrying the traffic that is subject to § 251(b)(5). 47 U.S.C. § 252(d)(2)(A). And it does not authorize either the FCC or state commissions to determine carriers' costs "with particularity." *Id.* § 252(d)(2)(B)(ii).

Section 252(d)(2) thus does not require that a carrier recover all of its particular costs of delivering traffic to its customers from the originating carrier, rather than from its customers. In fact, the statute expressly provides that "arrangements that afford the mutual recovery of costs" for purposes of § 252(d)(2) include "bill-and-keep arrangements," *id.* § 252(d)(2)(B)(i), under which no intercarrier compensation is paid and each carrier recovers its costs from its own customers, *see* Pet. App. 886a n.6. Because an arrangement in which a carrier recovers all of its costs from its customers and none from other carriers satisfies § 252(d)(2), it follows that § 252(d)(2) can be satisfied through an arrangement where a carrier recovers some costs from originating carriers and some from its customers.

What is more, nothing in the text of § 252(d)(2) requires (or precludes) that the "terms and conditions

---

by the D.C. Circuit, and it does not claim to have preserved that argument. Indeed, neither of the petitioners' briefs in the D.C. Circuit even cited § 205. Although, as Core notes, the Court has authority to consider some forfeited claims, *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), Core does not suggest that there is anything "exceptional" (*Duignan*, 274 U.S. at 200) about this case that would justify exercising such discretionary authority here.

[that] provide for the mutual and reciprocal recovery" of costs take the form of a single rate for all traffic subject to § 251(b)(5). The Commission's finding that ISP-bound traffic creates unique regulatory-arbitrage problems, along with the ability of LECs to recover costs from the ISPs, would support the creation of a distinct rule for the "mutual and reciprocal recovery" of costs of this unique category of traffic. Moreover, as the D.C. Circuit previously found, the Commission included the mirroring rule as part and parcel of its ISP pricing methodology, and that rule acts to extend the Commission's ISP-bound-traffic rate caps to voice traffic subject to § 251(b)(5), *see Core*, 455 F.3d at 278, so that a single rate applies to both ISP-bound traffic and such voice traffic, where mirroring occurs.

In sum, by allowing a carrier with ISP customers to recover costs up to a market-based cap from an originating carrier, with any further costs recovered from that carrier's customers, and by requiring that LECs offer to use the same rate cap for § 251(b)(5) voice traffic, the Commission's ISP-bound-traffic pricing methodology provides for the "mutual and reciprocal recovery" of a "reasonable approximation" of costs. Although the Commission was not obligated to abide by § 252(d)(2) here, that section requires nothing more; claims that the Commission's actions are inconsistent with the requirements of § 252(d)(2) are therefore unavailing.

C. The PaPUC's Challenges to the D.C. Circuit's Reasoning Are Equally Unpersuasive

1. The PaPUC repeatedly refers (*e.g.*, at 3) to the traffic at issue as "local" and suggests that the FCC's § 201(b) authority over interstate communications is inapplicable. But, as the D.C. Circuit correctly

concluded, that contention "fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged." Pet. App. 9a. "Petitioners," the court below explained, "do not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate." *Id.* Thus, "[g]iven that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)." *Id.* (second alteration in original).

2. The PaPUC's multiple references to the Commission's rate cap as "mandatory" (*e.g.*, at 21) and assertions that state authority over intrastate communications has been "usurp[ed]" (*e.g.*, at 3) ignore the actual application of the Commission's mirroring rule, an aspect of the Commission's treatment of ISP-bound traffic that neither petitioner challenges in this Court. As the Commission explained to the D.C. Circuit shortly after that rule was adopted, the mirroring rule is a "set of conditions for negotiations." Brief for FCC at 57, *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. filed Nov. 15, 2001); *see id.* at 20 (explaining that carriers that seek to pay no more than the rate caps for ISP-bound traffic must "voluntarily offer" to exchange local voice traffic with other LECs and wireless carriers at the rate caps; those other carriers must still "voluntarily elect[] to take advantage of that offer").

Under the mirroring rule, therefore, the rate caps apply to ISP-bound traffic only if the carrier originating such traffic elects to offer to exchange all non-

ISP-bound traffic that is subject to § 251(b)(5) at the same rate cap. *See* Pet. App. 965a. If the other carrier accepts the offer, the parties have agreed to exchange § 251(b)(5) traffic "without regard to the standards set forth in" § 251(b), as Congress expressly permitted. 47 U.S.C. § 252(a)(1). If the other carrier rejects the offer, the intrastate, non-ISP-bound traffic that is subject to § 251(b)(5) will be exchanged at reciprocal compensation rates set by state commissions (or by negotiation).

3. The PaPUC also asserts (at 20) that the Commission acted arbitrarily and capriciously in not applying "TELRIC" rates to ISP-bound traffic. But the Commission "provided a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet traffic [under § 201] and the regime generally applicable to inter-LEC compensation under § 251(b)(5)." Pet. App. 10a. Because the normal balance of incoming and outgoing calls "is utterly absent from ISP-bound traffic," the application of state-commission reciprocal-compensation rates to that traffic had encouraged carriers to "pay[] ISPs to become their customers" and threatened to "undermine[] the operation of competitive markets." *Id.* at 10a-11a (internal quotation marks omitted; second alteration in original).

III. THE QUESTION PRESENTED AFFECTS ONLY A SMALL AND DIMINISHING CLASS OF CASES

The question presented implicates a regulatory response to a discrete and transitory problem. The rules in question apply only to dial-up ISP-bound traffic, and dial-up is "being rapidly replaced by various forms of [broadband] service." Pet. App. 2a n.1.

Indeed, the PaPUC (at 30, 33) describes dial-up as only a "boutique market" today. A rule affecting only a disappearing type of traffic is unworthy of this Court's review.

More fundamentally, petitioners' complaints about the effects of the Commission's interim pricing methodology ignore the Commission's findings regarding the problem to which it was responding. The Commission found that state-commission decisions requiring payment of reciprocal compensation for ISP-bound traffic had led to "classic regulatory arbitrage" and "uneconomical results." Pet. App. 904a. It further found that such decisions "distort[ed] the development of competitive markets" by encouraging some carriers to pay ISPs to be their "customers," as well as inducing a number of "fraudulent schemes to generate dial-up [ISP] minutes." *Id.* at 909a, 944a & n.135. In the wake of the Commission's 2001 order, parties have negotiated commercial arrangements consistent with the Commission's pricing methodology for the overwhelming majority of traffic that LECs and wireless carriers exchange. *See* FCC C.A. Br. 49; Joint C.A. Br. of Intervenors in Supp. of FCC 26 (filed June 19, 2009). The existence of those binding arrangements further undermines the significance of the question presented.

Core's attempts to imbue the question presented with importance, and its vain efforts to connect this case to current policy debates, are unavailing.

A. The Commission's Pricing Methodology Neither Increases Costs of Dial-Up nor Improperly Discriminates Against Particular Carriers

1. Core asserts (at 26-29) that certiorari is warranted because the Commission's pricing metho-

dology increases the cost of dial-up Internet access service. But, even if true, that would not justify this Court's review, in light of the undisputed fact that the number of subscribers to dial-up service is "rapidly" shrinking. Pet. App. 2a n.1. Moreover, contrary to Core's claim that national policy favors promoting dial-up service, the relevant national policy is promoting deployment and adoption of higher-speed broadband services, not continued reliance on dial-up. *See, e.g.*, 47 U.S.C. § 1302(a), (d)(1) ("[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced [*i.e.*, broadband] telecommunications capability to all Americans"); FCC, *Connecting America: The National Broadband Plan* 5 (2010) ("[B]roadband is essential to opportunity and citizenship."), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

In any event, the Commission's findings, based on record evidence and the Commission's expertise, contradict Core's unsupported assertion (at 28) that the Commission's pricing methodology leads to higher prices for dial-up service. In its 2001 order, the Commission found that "the evidence in the record [did] not demonstrate" that "the cost of Internet access ha[d] increased" in "the growing number of states that ha[d] adopted bill and keep for ISP-bound traffic." Pet. App. 962a. Indeed, the Commission noted that it had "reason to believe that [a] failure to act, rather than the actions [it] t[ook] [in 2001], would lead to *higher* rates for Internet access," on the theory that LECs paying large amounts of reciprocal compensation on ISP-bound traffic would pass those costs on to their customers making dial-up calls. *Id.*

at 962a-963a (emphasis added); *see id.* at 11a. Moreover, the Commission concluded that, to the extent LECs recovered those costs from all customers, it would create "a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access," and "no public policy rationale . . . support[s]" such a subsidy. *Id.* at 963a; *see id.* at 11a.

In addition, Core's repeated assertion (at 2, 9, 23, 27) that the Commission's rate cap is "far below cost" ignores the Commission's findings. The Commission explained that it

> derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission. The interconnection agreements included lower rates for unbalanced traffic than for balanced traffic, and the rates declined over time, like the rate caps. Although the Commission made no specific findings [in its 2001 order] with regard to the actual costs associated with delivering traffic to ISPs, it noted evidence in the record that technological advances were reducing the costs incurred by carriers when handling all forms of traffic. The Commission also noted that "negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new agreements."

Pet. App. 41a (footnotes omitted).

2. Core's contention (at 26) that the rule at issue is "discriminatory" also fails. The Commission's pricing methodology does not discriminate against carriers serving ISPs because the Commission's mirroring rule leads to carriers originating ISP-bound traffic applying the same rates to both voice traffic subject

to § 251(b)(5) and ISP-bound traffic. *See Core*, 455 F.3d at 277-78.

Nor can Core credibly contend that the Commission's rules discriminate against LECs with ISP customers by forcing them to seek compensation from those customers. The Commission has long required incumbent LECs to seek additional compensation from their ISP customers if necessary fully to recover their costs of handling dial-up ISP-bound traffic. *See* Pet. App. 954a n.151. Moreover, that § 252(d) explicitly *permits* bill-and-keep arrangements (in which carriers recover *all* of their costs from their customers) destroys Core's claim (at 29) that requiring a carrier to recover *some* of its costs from its customers violates congressional policy. *See* 47 U.S.C. § 252(d)(2)(B)(i) (providing that § 252(d)(2) "shall not be construed . . . to preclude . . . bill-and-keep arrangements").

3. Equally unfounded are Core's (at 28-29) and the PaPUC's (at 8, 24) objections to the Commission's and the D.C. Circuit's conclusion that the problem to which the Commission's rules are a response is appropriately considered uneconomic regulatory arbitrage. The D.C. Circuit previously considered such objections and rejected "[t]he derision that Core levels at the FCC's terminology," explaining that the Commission's "economic analysis" is "reasonable." *Core*, 455 F.3d at 279. "In a nutshell," the D.C. Circuit stated, "the FCC determined in [its 2001 order] that, because ISP-related traffic flows overwhelmingly in one direction, a reciprocal compensation regime creates an opportunity for CLECs to sign up ISPs as customers and collect [compensation from], rather than pay [] compensation to, other carriers. In the FCC's view, this led to classic regulatory arbitrage."

Id. (citation and internal quotation marks omitted; alterations in original).

B. This Case Is Not a Vehicle in Which To Consider Regulation of Broadband or VoIP

Core asserts (at 31-33) that this case has relevance to other Commission initiatives, such as the regulation of broadband and VoIP. But it fails to explain how the resolution of the question presented — which involves the interaction between § 201 and §§ 251-252 — has any *legal* significance for those other issues.[7] Core's claim thus boils down to the unsupported notion that upholding the Commission's order in this case will encourage it "to adopt similarly extravagant interpretations of its statutory authority" in other contexts. Core Pet. 2. But this Court does not grant review to "send messages" to agencies.

Further, in addressing preemption of state regulation of VoIP, Core fails to mention that the Eighth Circuit — the court whose precedent Core asserts conflicts with the decision below — upheld the Commission's order on that subject. *See Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). In addition, although Core expresses surprise that the Commission has preempted state requirements regarding 911 service, it ignores that the FCC has expressly addressed (via a federal regime) 911

---

[7] Core's suggestion (at 31) that the Commission's end-to-end jurisdictional analysis could have implications for other cases provides no reason to grant the petition. Neither petitioner properly challenged that analysis in the D.C. Circuit. *See* Pet. App. 7a, 9a. This case therefore is not a vehicle for addressing that analysis, which in any event is correct and comports fully with decades of previous FCC and federal court decisions.

service as to VoIP and has "requir[ed] providers of interconnected VoIP service to provide E911 services to all of their customers as a standard feature of the service." First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 1 (2005), *petitions for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

---

[8] Core also asserts (at 30) that the decision below "upsets the federal-state balance" in the 1996 Act. But it ignores this Court's recognition in *AT&T* that the 1996 Act "unquestionably" took "the regulation of local telecommunications competition away from the States." 525 U.S. at 378 n.6. Even assuming that the 1996 Act required state rate-setting here (and, as the D.C. Circuit explained, it does not), this would not be a debate "about whether the States will be allowed to do their own thing," but about whether rates are set by the FCC or by a state commission implementing a federal methodology dictated by the FCC. *Id.* at 378. It is "hard to spark a passionate 'States' rights' debate over that detail." *Id.*

Respectfully submitted,

D. WAYNE WATTS
AT&T INC.
208 S. Akard Street
Suite 3702
Dallas, Texas 75202
(214) 757-3300

PAUL K. MANCINI
GARY L. PHILLIPS
AT&T SERVICES INC.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3055
Counsel for AT&T Inc.

RICHARD E. THAYER
LEVEL 3 COMMUNICATIONS
1025 Eldorado Boulevard
Broomfield, Colorado 80021
(720) 888-2620
Counsel for Level 3 Communications

CARL W. NORTHROP
STEPHEN B. KINNAIRD
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

MARK A. STACHIW
EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL & SECRETARY
METROPCS COMMUNICATIONS, INC.
2250 Lakeside Boulevard
Richardson, Texas 75082
(214) 570-4877
Counsel for MetroPCS Communications, Inc.

MICHAEL K. KELLOGG
Counsel of Record
SCOTT H. ANGSTREICH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@khhte.com)
Counsel for AT&T Inc. and Verizon

ANTHONY M. ALESSI
SPRINT NEXTEL CORPORATION
2D783 VARESAO202
12502 Sunrise Valley Drive
Reston, Virginia 20196
Counsel for Sprint Nextel Corporation

MICHAEL E. GLOVER
KAREN ZACHARIA
CHRISTOPHER M. MILLER
VERIZON
1320 N. Courthouse Road
Arlington, Virginia 22201
(703) 351-3071
Counsel for Verizon

October 12, 2010

173 (4)

SUPREME COURT, U.S.
FILED
OCT 27 2010
OFFICE OF THE CLERK

No. 10-189

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BOHDAN R. PANKIW
Chief Counsel
PENNSYLVANIA PUBLIC
UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-5000

JOSEPH K. WITMER
Counsel of Record
KATHRYN G. SOPHY
Deputy Chief Counsel
PENNSYLVANIA PUBLIC
UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-3663
joswitmer@state.pa.us

Counsel for Pennsylvania Public Utility Commission

October 27, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. RESPONDENTS CANNOT RECONCILE THE LOWER COURT DECISION WITH THIS COURT'S PRECEDENT	2
A. The Case Involves Intrastate Telecommunications.	2
B. This Court's Precedent Does Not Allow the FCC to Set Intrastate Rates.	4
C. The FCC Claims an Ultra Vires Power To Set Intrastate Rates Under Section 201 Despite This Court's Precedent.	6
D. The FCC Encroaches On The States' Right to Set Intrastate Rates.	7
E. The PaPUC Continually Challenged the FCC's End-to-End Analysis.	9
II. THIS DEPARTURE FROM PRECEDENT HAS LONG-TERM IMPLICATIONS.	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) 3

CONSTITUTION

U.S. Const. amend. X 4, 10, 11, 12

ADMINISTRATIVE DECISIONS

DQE Communications Network Services v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-027 3

Fiber Technologies v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-014 (February 23, 2007) 3

In re: Intercarrier Compensation, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 6, 2008) 5

In re: Intercarrier Compensation, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) 7, 10

In re: Time Warner, Inc., Docket No. WC 06-55 (March 1, 2007) 3

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) 4, 5, 7, 10, 12

Order on Mandamus, 24 FCC Rcd 6475 (2008) 4, 12

Wireline Broadband Order, 20 FCC Rcd at 14910-11 (2005) 3

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Communications Act of 1934,
47 U.S.C. §§ 151–615b 3, 5, 6, 11, 12
47 U.S.C. § 201 ..... *passim*
47 U.S.C. § 251 ..... *passim*
47 U.S.C. § 251(i) 6, 11
47 U.S.C. § 252 ..... *passim*
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 3, 5, 11, 12

OTHER AUTHORITY

FCC, Local Competition Report (September 2010) 8

IN THE

Supreme Court of the United States

No. 10-189

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Respondents' linguistic contortions cannot make the lower court's decision consistent with this Court's precedent. This Court limits the FCC's authority in Sections 251 and 252 of the Telecommunications Act of 1996 to establishing a cost-based pricing model that the states use to set the rates for local calls. Telecommunications Act of 1996, Pub. L. No. 101-104, 47 U.S.C. §§ 251, 252. The claim that $.0007 is not a rate but a pricing model elevates form over substance. The FCC incorrectly cites Section 201 and a need to ensure that local rates are just and reasonable as the basis for setting local rates.

I. RESPONDENTS CANNOT RECONCILE THE LOWER COURT DECISION WITH THIS COURT'S PRECEDENT.

A. The Case Involves Intrastate Telecommunications.

The Pennsylvania Public Utility Commission (PaPUC) seeks review of the $.0007 rate imposed on intrastate local calls. Respondents defend the rate as a pricing rule or an interstate rate under Section 201. 47 U.S.C. § 201

The local call at issue is a dial-up local call that originates and terminates within a local calling area, an area defined by the states. A customer dials the local number of an Internet Service Provider (ISP). The ISP's carrier takes that local call to an intrastate end-office where the call terminates. The ISP's carrier gets paid reciprocal compensation for carrying those local calls. Following termination at the end-office, the ISP provides internet access.

The FCC conflates what an ISP does to an intrastate call *after* the call is terminated to determine who sets the rate on the local call. The FCC's ratemaking power is premised on what occurs *after* local calls terminate. This is like suggesting that a local call to a local radio station talk show host is an interstate call subject to interstate rates because the call may be broadcast nationwide.

The FCC's reliance on an end-to-end analysis to support the result is incorrect and inconsistent.

This Court prohibits the FCC from imposing rates on local calls that originate and terminate within a state. This new approach also contradicts the FCC's holdings that wholesale service can be telecommunications regardless of the service provided by whole-

sale telecommunications. *PaPUC Writ* at 17-18 citing *In re: Time Warner, Inc.,* Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company,* FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company,* FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

The FCC circumvents precedent by claiming that its Section 201 authority over *interstate* communications warrants *rates* on local calls.

The Respondents portray the $.0007 rate as a rate cap set under a pricing rule for interstate service or telecommunications traffic under Section 201. This linguistic sleight-of-hand is inconsistent with this Court's precedent. It also ignores the physical termination point for an intrastate local call.

This Court never held that Section 201 of the 1934 Act gives the FCC *carte blanche* power to set an interstate rate for local calls, including calls within Sections 251 and 252. If that were the case, the FCC would have been setting local rates since 1934.

This Court's precedent on the 1996 Act upheld a TELRIC pricing model. TELRIC contains no rates and includes joint and common costs. Precedent prohibits the FCC from setting local rates. *Iowa Utilities Board v. FCC*, 219 F.3d 744, 756-757 8th Cir. 2000).

The Respondents are also silent on the new pricing rule. That is because this new rule is defended under Section 201 as a means of ensuring that local rates are just and reasonable.

In fact, the decision upholds the abandonment of TELRIC, the exclusion of joint and common cost, and a $.0007 rate that has no relationship to cost by the FCC's admission. *Order on Mandamus,* 24 FCC Rcd 6475, ¶ 24 (2008); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151,* ¶ 7 *(2001) (ISP Remand Order).*

The FCC ignores this Court's prohibition against setting rates for intrastate calls under Sections 251 and 252. The FCC asserts that Section 201 requires imposition of an interstate rate to ensure a just and reasonable rate under Section 201. This usurps the states' role is setting local rates and conflicts with Eighth Circuit precedent overturning proxy rates the FCC previously tried to impose on the states.

A writ is needed to preserve this Court's precedent, the 10th Amendment, and Congressional acts from being overturned with a sleight-of-hand called end-to-end analysis.

B. This Court's Precedent Does Not Allow the FCC to Set Intrastate Rates.

The FCC's basic premise is that Section 201 allows the FCC to ignore this Court's precedent on Sections 251 and 252. The FCC uses Section 201 to avoid that unfavorable precedent and impose rates under Section 201.

But, again, this Court held that Sections 251 and 252 governing intrastate local calls limit the FCC authority to establishing a pricing model. The states set rates based on that federal model. There is no exception allowing the FCC to replace state-set rates

with an FCC rate under Section 201 based on some end-to-end analysis.

The Respondents ask this Court to deny review because this Section 201 ratemaking power is confined to a diminishing market for dial-up local calls. See *FCC Brief* at 12; *Carriers Brief* at 29-35.

This decision is much broader. The decision positions the FCC to pursue its goal of imposing a unified rate on all telecommunications devoid of jurisdictional or regulatory distinctions. *Compare FCC Brief* at 24-25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216

The decision positions the carriers to have the FCC impose the unitary rate of $.0007 on *all* telecommunications that they seek. Compare *Carriers Brief* at 1-2 and 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 6, 2008) at 1-2 (emphasis supplied). It is no coincidence that the $.0007 rate at issue in this case is also more broadly sought elsewhere.

The Court's precedent limits the FCC's power under Sections 251 and 252 to establishing a model but not rates. The Respondents can acquire the authority to impose a unitary federal rate by citing this new Section 201 precedent.

A problem arises because Section 201 in the 1934 Act never authorized the FCC to set intrastate rates. Were it otherwise, the FCC would have been regulating local rates since 1934.

Another problem also arises because Sections 251 and 252 in the 1996 Act never authorized the FCC

to bring local calls within Section 201. Were it otherwise, the FCC would have been setting local rates since 1996.

Respondents further rely on the savings clause of Section 251(i). 47 U.S.C. § 251(i). But, Section 251(i) only preserved the FCC's Section 201 authority over interstate rates and service. Section 251(i) never saved any FCC power in the 1934 Act over local rates. Since the FCC lacked power to set local rates, there was nothing to save.

A writ corrects these expansive interpretations

C. The FCC Claims an *Ultra Vires* Power To Set Intrastate Rates Under Section 201 Despite This Court's Precedent.

The FCC concedes that Sections 251 and 252 apply to the ISP-bound calls at issue. But, those rates must be consistent with Sections 251 and 252, e.g., determined by the states using an FCC model. The FCC's claim that it can exercise authority to ensure just-and-reasonable rates under Section 201 based on an interstate service provided after a call terminates does not obviate Section 251 and Section 252 requirements or precedent.

Any actions the FCC takes under Section 201 must be consistent with the mechanism Congress provided in Sections 251 and 252: the FCC ensures just-and-reasonable rates by establishing a cost-based methodology for the States to apply.

The FCC's approach creates a conflict of §201 with Sections 251 and 252 that can be completely avoided. The Section 252 requirement of just-and-reasonable rates based on cost, as established by the States using the FCC's methodology, is consistent with the

requirement of just-and-reasonable rates in §201 and precedent.

A Writ can prevent the FCC from putting two provisions in conflict in order to usurp the states' right to set local rates.

D. The FCC Encroaches On The States' Right to Set Intrastate Rates.

The FCC cites the National Broadband Plan and transitioning internet access from dial-up to broadband as proof of the *de minimis* nature of its encroachment. *FCC Brief* at 23-24, n. 9. Their claim that its Section 201 authority to set the rate for local calls under Sections 251 and 252 will apply only to dial-up local calls is a mischaracterization.

The claim of minor encroachment on the states right to set local rates is belied by the FCC's intentions. The FCC has announced its intention to set unitary intercarrier compensation at rates that eliminate jurisdictional and regulatory distinctions. Compare *FCC Brief* at 25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216.

The carriers equally mischaracterize the decision. Their claim that the new rate applies only to dial-up local calls is belied by other filings urging the FCC to impose the same rate on *all* telecommunications. Compare *Carriers Brief* at 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) at 1-2 (emphasis supplied).

The Respondents portray the $.0007 rate as a remedy for economic arbitrage in a unique market where there is asymmetrical traffic and compen-

sation imbalances. This is another mischaracterization. *Carriers Brief* at 29-35. The mischaracterization is evident in the carriers recognition that the decision is not limited to local intrastate calls to access the internet. The decision also includes local voice traffic with other LECs and wireless carriers as well. *Carriers Brief* at 28.

The Carriers further mischaracterize the market for dial-up local calls as diminishing or a situation of unique imbalance. *Carriers Brief* at 1-2 and 29-30.

This portrayal is contradicted by the FCC's *Reports on Competition*. In local markets, incumbent carriers continue to possess an inordinate market presence compared to competitors. Those markets are asymmetrical. They have compensation imbalances. See FCC, *Local Competition Report (September 2010)*, Table I, End-User Switched Access Lines, Non-ILEC share is 28.1%. That asymmetrical traffic and compensation imbalance favors incumbents over competitors given that incumbent customers make more calls to competitors that competitor customers make to incumbent customers.

There is nothing unique or diminishing with asymmetrical traffic or unbalanced compensation. The only unique aspect is that competitors got more money from incumbents than incumbents got from competitors for local dial-up calls. The remedy is a unified FCC rate.

But, this encroachment on the states' right to set local rates under Section 201 has no limits on the scope of the FCC's power. Unlimited power to impose rates without limits or jurisdictional distinctions is more representative of the Respondents' intentions than claims that the case is only about a diminishing market and arbitrage.

Their language is not the language of a minor rate for a diminishing class of service in a shrinking market with unique characteristics. It is the language of carriers and a federal agency seeking unfettered power to set all telecommunication rates.

A writ is warranted.

E. The PaPUC Continually Challenged the FCC's End-to-End Analysis.

The PaPUC asks this Court to grant the writ to remedy the lower court's conclusion that the PaPUC never challenges the FCC's end-to-end analysis. *FCC Brief* at 10-11, 13.

In fact, the PaPUC continually opposed the FCC's so-called end-to-end analysis. The PaPUC disputed that this end-to-end analysis allowed the FCC to set rates for intrastate local dial-up calls to an ISP. The PaPUC consistently maintained that the end-to-end analysis was "internally inconsistent" and "clearly erroneous" from the start. *Pennsylvania Writ* at 18 citing *Brief of the Petitioner and the Intervening States, C.A. Joint Brief* at 30-33.

The PaPUC noted the FCC's admission that the local dial-up call originated and terminated intrastate at the called party's premises. *Joint Brief* at 10-11. The PaPUC then referenced the FCC's acknowledgement that the call path between the end-user and the ISP typically lies entirely within a local calling area, an area defined by the states. *Joint Brief* at 10-11.

The PaPUC and other states never accepted the FCC's faulty end-to-end analysis because it "completely fails to explain how the ISP's post-termination handling of a call has any bearing upon the recovery

of the terminating LEC's costs of transporting and termination the call" as required by Sections 251 and 252 of federal law. Compare *Joint Brief at 12* and *Joint Brief of the Petitioner and the Intervening States, C.A. Joint Brief*, at 30-33 with *FCC Brief* at 10-11, and 13, and *Carriers Brief* at 14-18 and 27-29.

II. THIS DEPARTURE FROM PRECEDENT HAS LONG-TERM IMPLICATIONS.

This Court should not be deceived by claims that there is no long-term impact. Respondents may differ on whether the decision addresses interstate communications service or interstate telecommunications traffic but they agree on the FCC's power. *FCC Brief* at I and *Carriers Brief* at I.

The decision furthers the agency's intention to impose a unified rate on all telecommunications without regard to jurisdictional or regulatory distinctions using Section 201. *Compare FCC Brief* at 24-25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216. This Court should not dismiss the PaPUC or Core concerns about Section 201 as theoretical.

The decision furthers the carriers' goal of having the FCC impose the $.0007 rate at issue in this case, which they refer to here as a pricing rule, on *all* telecommunications traffic. *Compare Carriers Brief* at 1-2 and 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) at 1-2 (emphasis supplied).

That is why the Respondents downplay any long-term impact from this decision, particularly on the 10th Amendment. That Amendment does not authorize a federal regulator to usurp the states right to

set rates for intrastate local calls. The Respondents' silence on that Amendment is telling. The Respondents never addressed the constitutional concern with a unified FCC intercarrier compensation regime that is devoid of jurisdictional or regulatory distinctions and applicable to all telecommunications.

The Act of 1934 never gave the FCC authority to remove jurisdictional or regulatory barriers in order to replace state-set local rates with interstate rates imposed under Section 201. Otherwise, the FCC would have been setting intrastate rates for local calls since 1934.

The Act of 1996 in Sections 251 and 252 does not empower the FCC to remove those distinctions by replacing state-set rates with interstate rates. There is no provision allowing the FCC to supplant Sections 251 and 252 with Section 201 rates using a newly minted FCC ratemaking power.

The Respondents' reliance on the 1996 Section 251(i) savings clause for Section 201 is unavailing. The FCC had no authority to regulate intrastate rates in 1934. The 1996 Act never gave the FCC that intrastate ratemaking authority. There is simply no pre-existing or ongoing Section 201 authority to save when it comes to the FCC's new power to impose interstate rates on intrastate local calls that is particularly when, as here, the intrastate call is clearly severable from the subsequent interstate service.

This Court's precedent reconciles the Acts of 1934 and 1996 with the 10th Amendment by holding that Sections 251 and 252 do not expand the FCC's authority to include local rates setting authority. The FCC can establish a pricing methodology, currently TELRIC.

The Court's precedent creates a workable federalist structure. The Court has meshed traditional state authority over intrastate matters in the 10th Amendment with the Acts of 1934 and 1996.

The new rule overturns that structure. The Respondents defend the FCC's new power over intrastate local rates under Section 201 as a necessary remedy. But, this new rule allows the FCC to replace state-set reciprocal compensation rates under Sections 251 and 252 with FCC rates imposed under Section 201. This decision allows the FCC to do that whenever the FCC decides that a unitary rate without jurisdictional or regulatory distinctions is warranted.

CONCLUSION

This Court's precedent limits the FCC to establishing a pricing model. The FCC cannot set rates for intrastate local calls. The new rule affirms a $.0007 rate imposed by the FCC on an intrastate local call under Section 201.

This Court's precedent upholding the TELRIC model contained joint and common cost recovery and no rates. The pricing model upheld in the *Order on Remand* contains no joint and common costs and imposes a $.0007 rate that bears no relationship to cost by the FCC's own admission. See *Order on Mandamus*, 24 FCC Rcd 6475, ¶ 24 (2008); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151*, ¶ 7 *(2001) (ISP Remand Order)*.

As this Court has held, it is a function of the states to set reciprocal compensation rates for intrastate calls using the federal pricing model. The PaPUC asks this Court to stop the FCC's attempt to encroach upon this states' right.

A writ is appropriate.

Respectfully submitted,

BOHDAN R. PANKIW
Chief Counsel
PENNSYLVANIA PUBLIC
UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-5000

JOSEPH K. WITMER
Counsel of Record
KATHRYN G. SOPHY
Deputy Chief Counsel
PENNSYLVANIA PUBLIC
UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-3663
joswitmer@state.pa.us

Counsel for Pennsylvania Public Utility Commission

October 27, 2010